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Blank Slates

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BLANK SLATES

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Courts sometimes confront gaps in formal law, where doctrinal sources like text, history, and precedent offer no guidance in resolving a particular case. When these gaps are narrow, judges can generally address them through analogical reasoning or intuition. But sometimes legal gaps are too substantial to be filled with one-off decisions, and judges are called upon to create whole legal tests without formal guidance or constraint. Courts lack a theoretical framework for addressing these difficult situations.

This Article analyzes these phenomena, which I refer to as legal blank slates, and provides a framework for addressing them. Blank slates are less common than other types of legal indeterminacy, like interpretive controversies, institutional conflicts, or narrow formal gaps. But they arise fairly regularly and often involve important legal issues. This Article surveys examples of blank slates in areas like Fourth Amendment law, free speech, the dormant Commerce Clause, and anti-discrimination law and draws lessons for a general theory of blank slates. It offers several strategies that courts might use to effectively address blank slates and develops a framework for choosing the best approach for a given situation.

Ultimately, blank slate theory can shed light on concrete doctrinal questions as well as broader debates about legal interpretation. It can, for example, suggest a new approach for determining the Fourth Amendment's scope and help explain why previous Fourth Amendment regimes have been unsuccessful. More generally, the theory can provide a unique perspective on interpretive debates, using the extreme case of blank slates to gain fresh insights into legal interpretation as a whole.

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INTRODUCTION

Indeterminacy can be found in every area of law. How a general legal rule should apply to a particular case is often unclear. Formal sources of law may conflict with each other, as may constitutional values, or branches of government. And legal regimes may leave gaps where doctrinal sources like text, history, or precedent offer no guidance in resolving a particular question.

Judges can often fill narrow gaps in law by reasoning from analogous precedents or relying on their intuitions about which outcome is fairest or best.[1] But some legal gaps are too substantial to be addressed with a one-off decision. They may, for instance, present legal questions that require courts to define a concept or create a test that potentially covers a broad range of conduct.[2] In these situations, courts are compelled to develop a standard to guide future decisionmaking—yet they must do so in the absence of formal guidance or constraint. We currently lack any concrete theory of how courts should proceed in such situations.

This Article's primary aim is to develop such a theory. It begins by identifying and exploring the concept of legal blank slates ("blank slates"). Blank slates are legal gaps that require a test or standard to resolve. Thus a legal blank slate involves 1) a legal question that calls for the promulgation of a test or standard, and 2) the absence of formal guidance for courts in shaping such a test or standard. Blank slates are less common than other types of legal indeterminacy. But they occur fairly regularly and often involve important legal issues.

For example, one of the most difficult questions in constitutional law concerns the scope of the Fourth Amendment. Courts have struggled to define the concept of a Fourth Amendment "search" for decades, adopting various standards only to later reject or modify them as they fail to produce coherent answers.[3] Indeed, the

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[1] *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 82–83, 106–08 (2008); JOSEPH RAZ, THE AUTHORITY OF LAW 195–97 (1979). Judges might also fill certain gaps by applying extra-legal default rules. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 520–23 (2013).

[2] *See infra* Part I.A.

[3] *Compare Olmstead v. United States*, 277 U.S. 438, 464 (1928) (the Fourth Amendment is limited to tangible things), *with Katz v. United States*, 389 U.S. 347, 353 (1967) (the Fourth Amendment's scope is not based on physical intrusion but is determined by expectations of privacy), *with United States v. Jones*, 132 S. Ct. 945 (2012) (the Fourth Amendment's scope is also determined by trespass concepts); *with Florida v. Jardines*, 133 S. Ct. 1409 (2013) (abandoning the trespass concept for a concept based on physical touching and

failures of current Fourth Amendment law might prompt us to reexamine the text, history, and purpose of the Amendment, in the hopes of discovering a more effective standard for Fourth Amendment search.

Yet in doing so, we only encounter a deeper mystery. Formal sources of law offer virtually no guidance on the scope of Fourth Amendment search. The text does not define "search," external sources give vague and conflicting definitions, and in context the term has a vast spectrum of potential meanings ranging from any gathering of information whatsoever to the physical inspection of a particular place.[4] The drafting and ratification histories of the Amendment are silent on the issue.[5] History in general tells us scarcely more than that the physical inspection of a house is a search—a wholly uncontroversial proposition that sheds little light on modern search questions.[6] And what little we know about the purpose of the Fourth Amendment is too vague and abstract to dictate which government actions constitute "searches."[7] In short, formal law is essentially silent on the issue, yet judges are compelled to set some standard to guide future courts and other legal actors. If courts discard the current standard that governs the Fourth Amendment's scope, what remains is a legal blank slate.

This Article examines the blank slate of Fourth Amendment scope and surveys other important blank slates in areas like free speech, the dormant Commerce Clause, and anti-discrimination law.[8] It evaluates how courts have confronted these difficult issues and draws lessons from these case studies for blank slate theory generally.

The Article analyzes several potential approaches to blank slates. Like most difficult legal or policy questions, blank slates tend to involve a balance of competing considerations.[9] The various strategies for resolving blank slates can be characterized by how they approach this underlying balance. For instance, a court might engage in direct normative balancing, creating a test that encompasses important considerations on each side of an issue and weighs them against each

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social norms); *see also* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 507–22 (2007) (describing how courts have departed from the *Katz* standard in a variety of ways, creating multiple competing tests for Fourth Amendment scope); *infra* Part II.A.3.

[4] *See infra* Part II.C.1

[5] *See infra* Part II.C.2.

[6] *Id.*

[7] *Id.*

[8] *See infra* Part II.

[9] *See infra* notes 76–78 and accompanying text.

other.[10] A court might instead use a proxy standard that is meant to capture key elements of the underlying normative balance, but which is generally clearer or easier to apply.[11] Or, a court might choose not to choose, declining to give a explanation for its decision in the hopes that a future decisionmaker with more information or institutional capacity will do a better job.[12]

The Article offers a meta-theory to help determine which strategy is optimal in a given situation. In general, the best strategy will vary based on the characteristics of the blank slate at issue. For instance, the more complex, broad, or unstable the blank slate, the more likely it is that direct balancing will be the optimal approach.[13] By contrast, narrower blank slates or those that raise issues on which there is little empirical data are more likely to be effectively addressed by proxy standards.[14] The article examines these and other factors and develops a detailed framework to help guide courts confronting blank slates.

Blank slate theory has implications for both concrete doctrinal questions and broader debates about legal interpretation. It can be used to evaluate courts' current approaches to blank slates and to help devise new, more effective legal tests. If existing law employs a balancing test where a proxy is likely to perform better, or vice versa, that can be a powerful argument in favor of doctrinal change.

The theory can, for example, help point the way towards an optimal regime for determining the Fourth Amendment's scope. Government surveillance presents complex legal and policy issues and encompasses a wide variety of government activities. The technological and social context of government surveillance is also especially unstable, and Fourth Amendment proxy standards have a history of being disrupted by new technologies. And the difficulty of obtaining relevant information about privacy harms, chilling effects, and law enforcement effectiveness is gradually decreasing.[15] Overall, blank slate theory suggests that some form of balancing test is likely to be the optimal approach for

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[10] The tests that govern content-neutral speech restrictions and government employee speech in First Amendment law are examples of this approach to blank slates. *See infra* Part II.A.

[11] The *Katz* test that defines the Fourth Amendment's scope by reference to people's "reasonable expectations of privacy" is a proxy standard meant to stand in for the normative question of whether people should have privacy. *See infra* text accompanying notes 89–90.

[12] Examples of choosing not to choose will typically be unpublished district court opinions, although higher courts sometimes attempt this option, with mixed results. *See infra* text accompanying notes 94–102.

[13] *See infra* text accompanying notes 103–109.

[14] *See id.*; *infra* text accompanying notes 115–118.

[15] *See infra* Part III.A.1.

Fourth Amendment search.[16] Although an effective proxy test might someday be devised, none currently exists, and none is likely to emerge.

Blank slate theory can also inform broader debates about legal interpretation and suggest improvements to both formalist and non-formalist interpretive theories. It offers a unique perspective on interpretive debates because blank slates function largely outside of these debates—they exist only when formal sources do not guide or constrain interpretation. Blank slate theory can improve non-formalist theories by providing specific direction to courts in reaching optimal outcomes or fashioning legal regimes that fit best with the broader justifications behind a body of law. And it can refine formalist theories, many of which acknowledge the possibility of legal gaps, by identifying significant gaps in formal regimes and offering a normatively appealing method for resolving them.[17]

Indeed, blank slate theory can contribute to interpretive theories even in situations where formal law is relatively clear. The theory can help courts concerned with maximizing utility to trade off the institutional and epistemic benefits of formal law against the costs of applying flawed tests. Under more formal approaches, it can help to determine when a statutory test is unworkable and should be repealed, or when courts should narrowly apply a precedent rather than expanding its reach. Moreover, when doctrinal sources provide only slight or ambiguous guidance, blank slate theory can bolster formal approaches and aid courts in construing underdeterminate law.

The following discussion proceeds in three Parts. Part I defines the concept of blank slates in detail and offers a theory of how courts can optimally address them. Part II surveys examples of blank slates, evaluates how courts have responded to them, and draws lessons for blank slate theory in general. Part III applies blank slate theory to the question of Fourth Amendment search. It then explores the implications of the theory for legal interpretation in general and examines how the theory can contribute to the rulification and legal change literature.

I. THEORIZING LEGAL BLANK SLATES

Difficult questions abound in law, particularly in the subset of legal conflicts

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[16] *See id.*

[17] For examples of formal theorists acknowledging the theoretical possibility of gaps in formal law, *see, e.g.*, William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131, 1146–47 (2017); Solum, *supra* note 1, at 471; Thomas M. Merrill, The Common Law Powers of Federal Courts, 52 U. CHI. L. REV. 1, 43 (1985).

that produce a written judicial opinion. A legal question may be difficult because formal sources of law point in different directions, or because policy considerations are in tension with existing formal law. It is often hard to determine how an abstract legal proposition should apply to a given case. Resolving clashes between the federal government and the states, or between co-equal branches of government, is especially challenging. These situations can all present courts with difficult and uncertain questions of interpretation, judgment, or policy. But these are not what I mean by "blank slates."

A blank slate refers not to any situation of legal uncertainty, but to broad questions of law for which there is minimal formal guidance. This Part offers a theory of legal blank slates and how courts can optimally address them.

A. Defining Blank Slates

1. The Spectrum of Legal Determinacy

Blank slates are extreme cases, existing at the far edge of the spectrum of legal determinacy. This section examines the range of legal determinacy, from clear applications of law all the way to blank slates.

In law and legal scholarship, we pay the most attention to persistent legal controversies, where the meanings of laws are disputed. But the vast majority of legal rules and applications are uncontroversial and clear. We know to stop at stop signs, avoid a vast catalog of crimes and civil offenses, and pay our taxes by April 15th.[18] We also know that a president must be thirty-five years of age, that the government cannot impose prior restraints on the press, and that accused persons have the right to a jury trial.[19] Even the legal questions involved in trial litigation are frequently uncontested or have determinate answers, and (albeit for various reasons) the overwhelming majority of cases in the federal courts of appeals elicit no dissent.[20]

Then there is the vast arena of legal controversy, where lawyers use various theories of interpretation and construction to answer difficult legal questions. In

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[18] *See* Richard H. Fallon Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1298 (2015).
[19] *See id.*
[20] *Id.*; Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1331 (2009); *see also The Supreme Court 2013 Term: The Statistics*, 128 HARV. L. REV. 401, 406 (2014) (reporting that roughly 64% of Supreme Court cases in the 2013 were unanimous).

these situations, text, context, general history, legislative history, intent, precedent, and/or policy considerations may conflict. Judges will resolve such disputes by assessing which side has the most compelling interpretive argument, and many judges will have systemic preferences for certain interpretive methods over others.[21] The meaning of the Second Amendment prior to the Court's decision in *District of Columbia v. Heller*,[22] for example, was an especially controversial and difficult question.[23] Yet it was not a blank slate in terms of formal law. Different sides of the dispute offered competing textual and/or historical interpretations of the Amendment, many of which yielded answers that were in tension with the answers given by longstanding precedent.[24] The Court had to analyze these competing sources of formal law, to weigh (or decline to weigh) them against extra-formal policy considerations, and to choose among the various competing historical, textual, precedential and other interpretations in order to reach a definitive interpretation and a corresponding outcome. The formal sources were conflicting and ambiguous, but they ultimately yielded a final answer.

Relatedly, in constitutional law, there are areas where two or more constitutional values conflict, and courts must either reconcile them or choose which will predominate.[25] Courts might resolve these cases on any of several grounds, perhaps by determining which principle more directly governs the dispute, which was latest to be enacted, or which serves more important or fundamental values.[26] Separation of powers and federalism issues are similar, as courts may be called upon to resolve conflicts between different branches of government, or between the federal government and the states.[27] Courts can generally draw on sources like text, historical practice, and precedent to resolve conflicts between institutions, although these sources likely offer less guidance than in the typical case. Systemic preferences as to methods of interpretation, as well as political or institutional preferences, are likely to play a prominent role.

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[21] *See* POSNER, supra note 1, at 92. Thus an originalist judge may prefer text and history to precedent and policy consequences, while a common-law constitutionalist might have the opposite preference.

[22] 554 U.S. 570 (2008).

[23] *See generally* Mark V. Tushnet, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS (2007).

[24] *See United States v. Miller*, 307 US 174 (1939) (interpreting the Second Amendment to apply only to state militias).

[25] Cases may arise where property rights conflict with free speech rights, *Marsh v. Alabama*, 326 U.S. 501 (1946), or principles of individual liberty with principles of equality, *compare Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), *with Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 449 (1968) (Harlan, J., dissenting). *See generally* Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1029–32 (1978).

[26] *See* Henkin, *supra* note 25, at 1031–32.

[27] *See id.* at 1032–37; *United States v. Nixon*, 418 U.S. 683, 705–13 (1974).

Then there are legal scenarios that offer even less formal determinacy than those described above. For instance, courts are often asked to apply broad legal rules to specific, unique disputes. Whether such a rule applies to a situation beyond the central domain of the rule may be unclear.[28] In most such situations, courts can seek some guidance from relevant precedents, widely accepted canons of construction, or historical analogues.[29] For example, a court might construe the broad concept of "negligence" in tort law by examining cases where similar conduct was considered to be negligent. Or it might construe the vague term "prospectus" in one provision of a statute by giving it the same meaning that it has in a different provision of the same statute.[30] In these cases, formal sources may direct courts to a particular construction of vague texts or broad legal principles.

Finally, there are questions for which existing formal sources do not provide any meaningful answer. Any legal regime, be it constitutional, statutory, or common law, will unavoidably leave doctrinal gaps that judges must fill in the course of resolving disputes.[31] Legal theorists have disputed whether these formally indeterminate legal questions have "right" answers in terms of normative consistency, morality, and fit with the overall structure and narrative of law.[32] These debates are largely tangential to the discussion of formal indeterminacy here. In discussing "legal gaps," I refer simply to legal questions on which traditional doctrinal sources (text, history, precedent, etc.) provide no useful guidance. Even proponents of the right answer thesis like Ronald Dworkin concede that some cases will be indeterminate in terms of doctrinal evidence.[33] Their point is that these cases can be said to have a right answer based on moral or other considerations even though the rightness of the answer is not

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[28] H.L.A. HART, THE CONCEPT OF LAW 126–27 (3d. ed. 2012).
[29] *See id.*; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 295 (2017).
[30] *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 569–70 (1995).
[31] *E.g.*, Thomas W. Merrill, *supra* note 17, at 33. Even formalist theorists almost universally acknowledge the existence of legal gaps. *See, e.g.*, *id.*; Baude & Sachs, *supra* note 17, at 1131, 1146–47 (discussing "cases…beyond the power of interpretive rules to cure" and noting residual indeterminacy even if one adopts both original textual meaning and "original methods" of constructing law from ambiguous texts); Solum, *supra* note 1, at 471 (acknowledging constitutional gaps "in which the constitutional text requires the existence of a rule of constitutional law but does not provide the content of that rule").
[32] *Compare* RONALD DWORKIN, A MATTER OF PRINCIPLE 138, 142, 161 (1985) (contending that every legal question has a best answer in the broader normative sense), *with* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 197–203 (1990) (contending that many legal questions have no "correct" answer).
[33] DWORKIN, *supra* note 32, at 134–40; 142.

"demonstrable" in terms of formal law.[34] On the Dworkinian view, principles of morality and integrity are no less "legal" than doctrinal sources like text and precedent.[35] I take no position on these issues, except to clarify that the concept of blank slates refers to an absence of doctrinal guidance. Cases presenting doctrinal blank slates might nonetheless have correct legal answers in terms of morality or other principles. Indeed, the theory of blank slates that I offer below may assist judges in fashioning legal tests that fit best with existing legal structures and their normative justifications, thus helping judges formulate the "correct" test despite the absence of traditional formal guidance.[36]

Legal gaps can arise in a variety of doctrinal regimes. In the common law context, courts often confront gaps when they are faced with questions of first impression, when no existing precedent in any jurisdiction has yet addressed a particular legal question. In wholly unique cases, judges may rely on their intuitions about which outcome is fairest or best.[37] Usually, however, these questions are sufficiently related to those resolved in previous cases that courts can draw non-determinative but helpful analogies.[38] Courts deciding novel cases often consider competing analogies or frameworks and choose the one that seems most closely related to the current situation.[39] A sophisticated judge may decide a new case by discerning the unstated rationales of previous cases and using them to reach the optimal outcome.[40] This process of comparison and analogy to previous cases is at the core of the common law, "a system built up by gradual accretion of special instances."[41]

Constitutional provisions are often abstract and broad, leaving gaps for courts to fill when they decide particular cases. For instance, a general constitutional principle may be wholly indeterminate in its application to a specific situation.[42] Some provisions are only partially determinate, ruling out some results but still

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[34] *Id.* at 142.
[35] *See* RONALD DWORKIN, LAW'S EMPIRE 225–27 (1986).
[36] *See supra* Part I.B.
[37] POSNER, supra note 1, at 106–08; DAVID A. STRAUSS, THE LIVING CONSTITUTION 38 (2010).
[38] *E.g.*, Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6–7 (1936) (describing how paradigm common law decisions are narrow, results-focused, and based on analogy, and noting that general rules or principles in the common law typically only emerge as related precedents accumulate over time).
[39] POSNER, supra note 1, at 180–81.
[40] *Id.* at 180–83 (describing how a court held that steamboat operators owe a high duty of care to protect their guests from theft because a steamboat stateroom is more analogous to a hotel room, where the hotel can efficiently prevent theft, than to an open railroad berth, where theft is harder to prevent and more responsibility must fall on the passenger).
[41] Stone, supra note 38, at 6.
[42] KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION 8 (1999).

permitting a variety of outcomes.[43] Courts might fill in these gaps by using extra-constitutional default rules,[44] reasoning from analogous constitutional precedents,[45] or relying on their intuitions regarding the best outcome for a particular case.[46]

Gaps in statutes arise because it is generally impossible for a statutory scheme to provide a rule for every eventuality or anticipate every potential application of a rule.[47] Courts are often called upon to fill these gaps, in a process similar to addressing new questions in a common law system. When filling relatively narrow statutory gaps, courts can sometimes look to the objectives of the statute or to the broader statutory structure. Judges can then select an outcome that best comports with the rest of the statute and effectuates its goals.[48] Thus it may be possible to answer specific questions like "does ERISA preempt all malpractice claims against participating medical providers?" by looking to the general structure or purpose of the statute.[49]

But what if a statute, constitution, or body of law leaves gaps that are too broad to fill with a narrow, one-off decision? These situations may present a court with a legal blank slate.

2. Definition and Explanation

In its most basic terms, a legal blank slate refers to a situation where formal sources of law offer little to no guidance to courts in addressing a broad legal issue. The paradigm legal blank slate requires 1) a legal question that calls for the promulgation of a test or standard, and 2) a lack of useful formal guidance for courts in shaping such a test or standard.

The first part of this definition refers to those legal issues that compel a court

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[43] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 10–11 (2015).
[44] *See* Solum, *supra* note 1, at 520–23; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2005).
[45] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894–98 (1996).
[46] STRAUSS, *supra* note 37, at 38; POSNER, *supra* note 1, at 106–08.
[47] *See generally* J. Gordon Christy, *A Prolegomena to Federal Statutory Interpretation: Identifying the Sources of Interpretive Problems*, 76 MISS. L.J. 55 (2006); *supra* note 17, at 43.
[48] *See, e.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 187–88 (1996).
[49] ERISA does not preempt all malpractice claims, although the relevant statutory language in context is indeterminate on the matter. *See e.g.*, *Moreno v. Health Partners Health Plan*, 4 F. Supp. 2d 888 (D. Ariz. 1998); *Prihoda v. Shpritz*, 914 F. Supp. 113 (D. Md. 1996); *Haas v. Group Health Plan, Inc.*, 875 F. Supp. 544 (S.D. Ill. 1994); *see generally* Christy, *supra* note 47, at 121.

to promulgate a standard or test that will govern future cases. Establishing such standards may be necessary so that future courts can address related questions consistently and equitably and private parties can determine the general legal rules that will apply to their conduct.[50] In these situations, courts are not simply asked to decide whether a rule applies to a certain situation or whether a particular thing fits into a statutory category. Instead, they are called upon to develop a test that potentially covers a broad range of conduct. Often, the parties to a litigation will expressly ask the court to formulate such a test, and will offer competing proposals for particular tests that the court should adopt.[51] In other situations, deciding a case may require a court to define a concept or give a rationale for an outcome where the definition or rationale given are highly likely to guide future cases involving similar issues. For example, in *Harris v. Forklift Systems, Inc.*, the Court had to define the concept of a "hostile and abusive work environment," and in doing so it formulated a test for future courts to apply.[52]

The second part of the definition of legal blank slates refers to situations where the traditional formal sources of law—text, context, legislative history, intent, historical practice, precedent—provide no useful guidance to courts on how to address a legal issue. This may occur because these formal sources are indeterminate, or because any formal guidance they might give has been rejected by widely accepted precedent or rendered obsolete by developments in related legal areas.[53] For example, when courts had to decide whether a restriction on the time, place, or manner of speaking violated the First Amendment, they had little or no formal guidance to assist them.[54] The text does not address such situations, the drafting history is silent, and historical context sheds virtually no light on the subject.[55] By contrast, and even though the issue was controversial for decades, the text and purpose of the First Amendment offered at least some guidance to courts trying to determine whether viewpoint-based speech legislation should be

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[50] *See* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 11 (1988).
[51] *See infra* text accompanying notes 292–295. In a non-blank-slate context, *see, e.g.*, Brief for the Petitioner, *Manson v. Brathwaite*, 432 U.S. 98 (1977) (No. 75-871), 1976 WL 181403, at *9–11 (in assessing a suggestive photo line-up, the court should use a totality of the circumstances test); Brief for Respondent, *Manson v. Brathwaite*, 432 U.S. 98 (1977) (No. 75-871), 1976 WL 181405, at *12–29 (in assessing a suggestive photo line-up, the court should use a per se rule).
[52] *See infra* Part II.D. In the recent criminal case *Maslenjak v. United States*, the Court noted that it was important for the Court to formulate a test because "[t]he Government needs to know what prosecutions to bring; defendants need to know what defenses to offer, and district courts need to know how to instruct juries." 137 S. Ct. 1918, 1927 n.4 (2017).
[53] *See infra* Part I.C.1.
[54] *See infra* Part II.A.
[55] *See id.*

generally prohibited.[56]

It should be acknowledged that few "blank slates" will ever be perfectly blank. A law's history, text, or purpose may at least provide general inspiration for a way forward, even if the guidance and constraint they offer is negligible.[57] Thus formal sources of law need not be utterly silent for a situation to constitute a legal blank slate. When these sources provide minimal formal constraint or guidance, that is sufficient to identify a situation as a legal blank slate.

Indeed, the "blankness" of a legal situation is a spectrum rather than a binary—the above description of the various kinds of legal indeterminacy demonstrates as much. Legal issues range from those clearly determined by existing formal law, through those where the law is controversial or ambiguous, to those where courts must fill small gaps in existing law, all the way to blank slates, where courts must fill larger gaps with minimal formal guidance. This Article focuses on the extreme end of this spectrum, where formal law largely fades from view and blankness prevails. But examining these end cases can yield insights that apply to the entire spectrum, as discussed in Part III.

3. How Blank Slates Arise

To fully understand legal blank slates, it helps to understand how they originate. Legal blank slates can arise in a variety of ways. For example, when a court fills a narrow statutory gap by deciding that a type of conduct violates a statute, it may open up a broader gap that it later needs to fill. Case 1 may simply decide that an owner's manipulative sales techniques violate a statute that prohibits "deceptive business practices" in retail stores. But soon enough, case 2 presents the question of what exactly "manipulative sales techniques" are, and the court is compelled to give guidance to future courts and to store owners regarding what is not allowed in the context of retail sales.[58] This definitional question will likely present a blank slate, as the court must flesh out a concept not directly addressed in the text or history of the statute. Similar blank slates may arise in the common law context if a court fills a precedential gap with a broad concept and

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[56] *See, e.g.*, *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 394–95 (1950) (conceding that an anti-communism provision in the Taft-Hartley Act would be unconstitutional under a textual interpretation of the First Amendment).

[57] *E.g.*, Merrill, *supra* note 17, at 43 (recommending that courts facing difficult questions of interpretation use general purpose to construct a workable meaning).

[58] This hypothetical situation is analogous to the Civil Rights Act scenario discussed *infra* Part II.D.

then future courts are asked to define that concept.

Blank slates might also arise in the common law context if a case presents a broad question so new that no existing precedent provides a determinative analogy. Courts in such a situation may feel compelled to promulgate a new rule or standard to address the novel, important question. This could occur, for instance, if courts hear cases involving advanced technologies that present unique legal issues.[59] Still, such cases are likely to be rare—the common law tends to evolve gradually and in small increments.[60]

Blank slates may also occur when Congress writes a statute in terms so open-ended and abstract that they essentially amount to a command to courts to develop a new body of common law to govern the issue. Many courts and commentators consider the Sherman Act to be such a statute,[61] along with statutes such as Section 1983[62] and the Taft-Hartley Act.[63] Such statutes can pose broad, novel questions on which there is no statutory guidance and no useful common-law analogue.

Perhaps the most significant blank slates are those that arise over time as economic, cultural, or technological changes pose questions not contemplated by the framers of a law or covered by any formal sources. For instance, the process of societal change is likely the primary source of the blank slate surrounding the scope of the Fourth Amendment.[64] The Founders had little reason to specify the scope of the "search" concept, because most Founding-era searches were easy to identify—they involved physical violation of the home or other property.[65] Modern search questions only arose in the radically changed context of the

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[59] Self-driving cars or advanced robots may present such issues, even though some analogies to prior technologies or entities can be drawn. *See, e.g.*, Frederick D. Page & Norma M. Krayem, *Are You Ready for Self-Driving Vehicles?*, 29 Intell. Prop. & Tech. L.J. 14 (2017) (outlining the multitude of legal and ethical issues raised by self-driving cars). Likewise, new technologies can pose unique questions of patentability or copyrightability not addressed by existing intellectual property statutes or precedents. *See generally* Jorge L. Contreras, *Narratives of Gene Patenting*, 43 F.S.U. L. REV. 1133, 1192–94 (2016) (describing the primary arguments and concepts typically used in cases involving novel technological categories).

[60] *See* Stone, *supra* note 38, at 6–7.

[61] *See* 15 U.S.C. § 1; *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007); ("From the beginning the Court has treated the Sherman Act as a common-law statute."); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983).

[62] *See* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421-22 (1989).

[63] *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989).

[64] *See infra* Part II.C.

[65] *See* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70–76 (2012).

Twentieth Century, when police officers could use listening devices to record private activities or access intimate conversations transmitted through wires over long distances. Neither the telephone, nor the "bug," nor even the professional police officer existed in 1791.[66] Blank slates arising from societal and technological changes may appear with increasing frequency in constitutional law, as we move ever further away from the world in which the Constitution was drafted.

Substantial contextual change can also lead to the widespread rejection of those formal sources of law that might otherwise provide guidance. When certain interpretations of the text or history of a law would undermine the core values of the law if applied in a radically changed context, those interpretations are likely to be discarded. This may leave courts without guidance on future issues. For instance, a strict textual interpretation of the Fourth Amendment's "persons, houses, papers, and effects" clause, which would allow the government to wiretap and bug citizens without constitutional check, has been almost universally rejected.[67] Likewise, interpreting the First Amendment to bar only prior restraints, as its framers likely contemplated, has been near-universally rejected for almost a century.[68] This widely accepted departure from historical practice raised new legal questions not addressed by existing formal sources, potentially creating several substantial blank slates.

Thus legal blank slates can arise for a variety of reasons, and in every area of law, from constitutional law to common law tort cases. To this point, however, scholars have not identified or considered blank slates separately from the far more common phenomena of legal indeterminacy and legal gaps. The next section analyzes how courts can optimally address legal blank slates.

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[66] In the Founding era, there were no police officers in the colonies or early states. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 620. (1999). There was essentially no proactive law enforcement, and constables were generally poor civilians who did a year-long tour of duty with the goal of keeping the peace, not investigating crime. *Id.* at 620–22. The Framers did not directly address warrantless searches in part because constables were unlikely to search without warrants, lest they be sued or physically resisted. *Id.* at 625–26; Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19, 82–83 (1988). As concerns about crime grew during the nineteenth century, professionalized police departments formed. Davies, *supra,* at 725. Officers were given more ex officio authority and greater legal protection against citizen resistance. *Id.* These developments undermined the effectiveness of trespass actions against individual officers as a means of enforcing Fourth Amendment values. *Id.*

[67] *See infra* Part II.C.1.b.

[68] Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2198–99 (2015).

B. A Theory of Blank Slates

The previous section identified the phenomenon of legal blank slates and examined their origins. It may be useful to courts facing blank slates to know precisely the situation they are in and to examine how courts previously addressed similar situations.[69] But a coherent theory of blank slates and how courts can optimally address them is also necessary.

Existing writing on legal indeterminacy does not address blank slates, and thus offers little insight into how courts should develop a legal standard or test in the absence of formal guidance. Rather, scholars and judges who have acknowledged legal gaps have generally thought of judges filling gaps as acting in a legislative capacity.[70] As such, judges can make policy largely according to what they think best,[71] consulting their moral intuitions,[72] personal experience,[73] policy judgments,[74] or emotions.[75]

This may be an accurate enough account of how judges will fill gaps in one-off cases. It may even describe how they will formulate tests and standards when confronted with legal blank slates. But it offers little guidance as to how judges *should* approach such situations, or how to formulate tests that will effectively guide future cases and yield optimal outcomes. We lack a prescriptive theory of

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[69] *See infra* Part II.

[70] *E.g.*, RAZ, *supra* note 1, at 197–99 (1979). Ronald Dworkin takes a philosophically different approach to doctrinal indeterminacy that ultimately offers judges similar advice. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 124, 128 (1977) (describing the central role of political and personal convictions in Dworkinian adjudication). Dworkin argues that judges should address difficult legal questions by choosing the outcome that fits best with the overarching narrative or theory of law and with political morality. *Id.* at 107; DWORKIN, *supra* note 32, at 138–43. Although Dworkinian judges can look to the broad narrative of law and strive for normative consistency, this general approach to law does not specifically address blank slates or how courts should formulate legal tests in the absence of doctrinal guidance. Indeed, the choice structure described below may help Dworkinian judges determine which test or standard fits best with existing legal and normative structures.

[71] *See, e.g.*, RAZ, *supra* note 1, at 197. This prescription for legal indeterminacy is shared not only by legal positivists like H.L.A. Hart and pragmatists like Richard Posner, but also by more formalist theorists. *See, e.g.*, Merrill, *supra* note 17, at 43; Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 777–78 (1963).

[72] EISENBERG, *supra* note 50, at 148.

[73] POSNER, *supra* note 1, at 94-95 (citing Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169, 260–261 (1968)).

[74] STRAUSS, *supra* note 37, at 38.

[75] POSNER, *supra* note 1, at 106.

blank slates, one that could assist courts as they create legal tests with minimal formal guidance.

The legal questions that present blank slates are indeed likely to be difficult. They arise in the context of a legal dispute in unfamiliar territory, as courts weigh competing considerations and assess various potential tests to fill a doctrinal gap. In such situations, definitive moral or deontological imperatives are unlikely to be found. Even in the constitutional context, blank slates rarely involve the core substance of constitutional rights. Rather, blank slates often occur when courts must specify the boundaries of a right or resolve ancillary issues that relate to rights. And in common law and statutory contexts, absolute rights tend not to be involved at all.

What remains in most cases is a situation typical of decisionmaking in general—a balancing of competing considerations. Although many of our decisions are automatic or habitual,[76] we regularly make our conscious decisions—should I go to the gym? should I have a beer? should I go to this store or that one?—by informally weighing various considerations and choosing what we think will produce the best outcomes.[77]

A court facing a legal blank slate is in a similar situation. It is presented with a legal question that reflects an underlying normative balance: in the absence of legislative commands or other formal guidance and given the considerations favoring one outcome and the considerations favoring an opposing outcome, which outcome should prevail? This innate balance is present even if courts avoid confronting it.[78] Indeed, avoiding it may often be the best option, as the next

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[76] Matthew Tokson, *Judicial Resistance and Legal Change*, 82 U. CHI. L. REV. 901, 920–22 (2015).

[77] *E.g.*, Fried, *supra* note 71, at 764–65 (describing the informal balancing that we apply to everyday decisionmaking).

[78] Scholars and judges have long recognized that a normative balance underlies even bright-line rules. *See, e.g.*, Stephen E. Gottlieb, The Paradox of Balancing Significant Interests, 45 Hastings L.J. 825, 845–46 (1994) ("[B]alancing is ubiquitous within what we describe as rules—indeed, it is hard to avoid."); Henkin, *supra* note 25, at 1023–24 (describing the normative balance that underlies even clear constitutional rules); Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960) ("Of course the decision to provide a constitutional safeguard for a particular right, such as the fair trial requirements of the Fifth And Sixth Amendments and the right of free speech protection of the First, involves a balancing of competing interests."); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) ("[J]udges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said.").

section discusses.

1. Three Approaches to Blank Slates

Courts confronting legal blank slates might pursue one of three general strategies. First, they can engage in direct normative balancing, instructing future courts to expressly weigh the competing considerations at issue. Second, they can use a proxy value, which is meant to capture the normative values at stake but is easier for judges to apply. Finally, they can "choose not to choose" by refusing to promulgate any test to fill the blank slate and resolving the case without a substantive explanation or rationale. This section describes these general strategies in more detail.

Direct Normative Balancing --- Addressing a blank slate with direct normative balancing entails establishing a balancing test that encompasses important considerations on each side of an issue and weighs them against each other. Subsequent cases would then employ the same balancing test to resolve similar questions. Over time, however, rules might be promulgated to address particular situations, as courts identify areas where normative balancing consistently yields one outcome instead of another. This process of "rulification" is similar to that observed in common law contexts evolving over time.[79]

The creation of a normative balancing test generally requires courts to identify the core normative or policy considerations surrounding a legal question.[80] Concrete factors that can be evaluated with real-world data are, all else equal, preferable to vague or abstract values.[81] In order to create a workable test, courts will generally exclude considerations that are less important or are particularly difficult to understand or quantify.[82] Nonetheless, one of the primary benefits of direct normative balancing is that it allows judges to take account of the complexities of an issue and the many factors that might determine its optimal

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[79] *See* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 654–55 (2014).

[80] *See* Frank N. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 22–25 (1988) (discussing how balancing calls for judges to be open about the considerations that drive their decisions and laying out various principles of good balancing).

[81] *See* Gottlieb, *supra* note 78, at 858.

[82] *See* Coffin, *supra* note 80, at 25 (discussing the dangers of making balancing tests too fact-specific to offer guidance to future cases); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 977–78 (1987) (highlighting the problem of potential underinclusiveness in balancing tests). Courts typically cannot evaluate and discuss every factor that might potentially bear on a decision, and even "totality of the circumstances" tests are unlikely to consider every relevant circumstance. *See id.*; Coffin, *supra* note 80, at 25.

outcome. Another benefit is that it encourages transparency, directing judges to give a full account of their decisionmaking process and subjecting that account to public and professional appraisal.[83] This judicial openness can reveal judges' faulty assumptions, illogic, or biases—or offer convincing guidance for future courts to follow.[84] The balancing test used in First Amendment law to evaluate restrictions on the speech of government employees is an example of a direct normative balancing test that addresses a legal blank slate.[85] It explicitly weighs the interests of employees in commenting on public matters against the interests of the government as an employer in efficiently providing public services.[86] Likewise, courts engage in direct normative balancing when determining the scope of the dormant Commerce Clause.[87]

Proxy Values --- A proxy value, or a "false target," is a standard or rule that is meant to stand in for the normative balance underlying a legal blank slate. The proxy value is intended to embody the key normative considerations, to capture what is essential about the normative question being decided. Rather than directly addressing the normative values at issue, courts can focus on a proxy standard and decide the case according to whether the standard is met. This will generally make the inquiry more conceptually simple, and it may reduce courts' decision costs, depending on how easy the standard is to adjudicate.[88] Indeed, administrability and conceptual clarity are the primary benefits of proxy values relative to direct normative balancing.

The *Katz* test is an example of a proxy test—it directs courts to look at people's expectations of privacy as a proxy for the normative question of whether they should have privacy. Thus, at least in most cases, courts do not directly balance privacy interests against law enforcement interests in order to determine the Fourth Amendment's scope.[89] If an individual has a reasonable expectation of privacy, that is normally sufficient to establish that the Fourth Amendment applies

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[83] Coffin, *supra* note 80, at 24–25.

[84] *Id.* Public and peer scrutiny of such decisions can also result in improved decisions over time, encouraging consensus and deterring decisions based on flawed or biased reasoning. *Id.; see also* Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821, 825-26 (1962) ("Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them … Moreover, this approach should make it more difficult for judges to rest on their predispositions without ever subjecting them to the test of reason. It should also make their accounts more rationally auditable.").

[85] *See infra* Part II.A.

[86] *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

[87] *See infra* Part II.B.

[88] On average, proxy tests will have lower decision costs than normative balancing tests.

[89] One notable exception is *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984).

without further inquiry.[90] The proxy dictates the scope of the Amendment. Likewise, in medical malpractice cases, courts typically use the industry standard of care as a proxy and do not directly balance the burdens and harms of particular medical precautions.[91]

Proxy tests can be inspired by history, or the general purpose of a law, or a sense of "best fit" with existing legal structures, or broader normative theories.[92] For instance, *Katz* was likely inspired in part by the Fourth Amendment's general purpose of protecting citizens' privacy from arbitrary governmental intrusion.[93] But this abstract idea did not compel the particular *Katz* test and did not offer guidance as to how courts should determine the scope of the Fourth Amendment in particular cases. History or fit or broad normative theories may likewise inspire proxy tests, but, in a blank slate situation, they do not compel them.

Choosing Not to Choose --- A Court facing a blank slate could choose to do nothing. That is, it can decline to promulgate a test even though the situation seems to call for one in order to give guidance to affected parties and promote consistency and equality in future adjudication. A court could simply reach a decision that a given set of facts constitutes a Fourth Amendment search, or a "hostile and abusive work environment" under the Civil Rights Act of 1964, without explaining why.

This approach would be most feasible for district courts, which can generally decline to issue opinions and whose opinions are not technically binding on future courts.[94] And this approach might be justified on the grounds that higher courts, or any court deciding later in time, may be better suited than the initial trial court to formulate the optimal test. Appellate courts may have institutional advantages (fewer cases, multi-judge panels, more experienced judges) that make them better

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[90] *E.g.*, *Bond v. United States*, 529 U.S. 334, 338–39 (2000); *Minnesota v. Olson*, 495 U.S. 91, 98–99 (1990); *California v. Greenwood*, 486 U.S. 35, 40–41 (1988).

[91] E.g., *Hall v. Hilbun*, 466 So. 2d 856, 873 (Miss. 1985); *see generally* Michelle M. Mello, *Of Swords and Shields: The Role of Clinical Practice Guidelines in Medical Malpractice Litigation*, 149 U. PA. L. REV. 645, 654–661 (2001).

[92] *See* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1837–50 (2016) (proposing positive law as a proxy for Fourth Amendment scope inspired in part by history, structural fit, and purpose); DWORKIN, *supra* note 32, at 134–42 (describing the concept of narrative fit as a means of reaching "right" answers in otherwise irresolubly ambiguous legal disputes); Solum, *supra* note 43, at 5 (discussing proposals that indeterminate constitutional questions might be resolved based on "normative considerations that are not fully determined by the communicative content of the constitutional text").

[93] *See infra* notes 243–245 and accompanying text.

[94] *See, e.g.*, *Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co., Ltd.*, 240 F.3d 956, 965 (11th Cir. 2001); *In Re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987).

suited for establishing standards to govern future cases. Courts deciding later in time may also have an advantage because they can examine earlier case outcomes for useful patterns or other data. For instance, if nineteen cases have found a search when government agents track people with drones, and only one case has not found a search, then the court hearing the twenty-first case could confidently promulgate a rule that tracking people with drones is a search. In this process, similar to the classic common law process, courts could slowly create rules to govern a body of law. The downside of this approach in blank slate situations is that it leaves affected parties without guidance and risks chaos and inconsistency among courts—what happens if the first twenty cases are split 10-10? Moreover, a similar process of rulification is likely to occur if courts take a direct normative balancing approach, and that approach has the added benefits of transparency and at least some guidance for courts and affected parties.[95]

Choosing not to choose is also difficult for appellate courts, which generally issue written opinions explaining their reasoning, especially in cases of first impression.[96] If an appeals court writes an opinion, it is likely that its reasoning and mode of analysis will be followed by lower courts even if it does not expressly establish a test or standard.[97] Courts may thus create tests inadvertently. Interestingly, something similar happened to the majority in *Katz*, which did not set out any test for the Fourth Amendment's scope going forward.[98] The famous *Katz* test comes instead from Justice Harlan's solo concurrence.[99] Harlan's ultimately flawed approach became dominant because courts faced with difficult decisions sought guidance from a legal test, and Harlan's was the only one available.[100]

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[95] *See infra* Part III.B.

[96] *See, e.g.*, D.C. Cir. R. 36(c) (stating that "[i]t is the policy of this court to publish opinions and explanatory memoranda that have general public interest," and providing that an opinion "will be published" if the case meets one of several criteria, including "case[s] of first impression or the first case to present the issue in this court."); 1st. Cir. R. 36.0 (stating that "the court thinks it desirable that opinions be published," a policy that can only be overcome in those cases where the opinion does not address novel facts or law or otherwise provide relevant guidance to future litigants). Appeals court opinions are especially useful in difficult or novel cases, because they can guide lower courts and provide other appeals courts with reasoning to either agree with or critique.

[97] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

[98] *Katz v. United States*, 389 U.S. 347 (1967).

[99] *Id.* at 361 (Harlan, J., concurring).

[100] *See generally* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 113 (1997) (describing the necessity of legal tests). For examples of appeals courts relying on Harlan's concurrence for guidance soon after *Katz*, *see, e.g.*, *Gov't of*

Choosing not to choose thus likely works best as a temporary solution primarily available to district court judges. Judges who have no insight into a particular legal issue, or who doubt their institutional or personal capacity to address it, can resolve the case without an opinion and leave it to future courts to fill in the blank slate. This might minimize poorly reasoned precedents and allow courts to self-sort according to their interest in a legal question and capacity for addressing it. Legislatures might also eventually address legal questions, bringing to bear their expertise in rule promulgation.[101] But, at least in the statutory and common law contexts, legislatures are equally able to weigh in *after* courts have acted—indeed, legislatures may learn from existing legal tests, modifying or correcting them based on the lessons of experience.[102]

What happens when a court does attempt to address a broad legal question for which there is little formal guidance? The next section examines how courts should choose between direct normative balancing and proxy values when faced with a legal blank slate.

2. Choosing an Approach

Selecting a test to fill in a legal blank slate is both difficult and important. If adopted by other courts, the test will govern adjudication of a broad legal issue for

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Virgin Islands v. Berne, 412 F.2d 1055, 1061 (3d Cir. 1969); *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969).

[101] Of course, the wait for legislatures to address unresolved legal issues may be a very long wait. Legislatures may be reluctant to involve themselves in establishing doctrinal tests or may focus on more politically salient issues. Further, the substantial enactment costs of legislation and the preferences of entrenched interest groups combine to produce a powerful bias in favor of legislative inaction. *See, e.g.*, FRANK R. BAUMGARTNER, ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 24–26, 45 (2009). This legislative status-quo bias is likely increasing over time, as political parties grow more polarized and the use of filibusters becomes routine. *See, e.g.*, Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PENN. L. REV. 1, 14 (2014).

[102] For example, in *City of Mobile v. Bolden*, 446 US 55 (1980), the Supreme Court upheld Mobile's electoral system under the Voting Rights Act, interpreting the Act as only prohibiting purposeful discrimination. In 1982, in response to the holding, Congress amended the Voting Rights Act of 1965 to establish a discriminatory effects test and making clear that a statutory violation did not require discriminatory purpose. *See 96 Stat. 134*; S. Rep. No. 97-417 at 36–40 (describing the practical flaws in the Supreme Court's interpretation and the resulting bad consequences, which helped motivate Congress to amend and improve the test).

In the constitutional context, legislatures may pass laws that embody an interpretation of the Constitution and help to fill in its gaps, but ultimately interpreting the Constitution and addressing its indeterminacies is the province of the judiciary. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803).

the foreseeable future. So the choice is worth considering in some detail.

As discussed above, the foundational strategic question is whether the test should be a direct normative balancing test or whether courts should use a proxy value that stands in for the underlying normative balance. There are several considerations that bear on this question. This section describes these factors, in descending order of importance.

First, how likely is it that a proxy value can capture the underlying normative balance at issue? The more that a proxy fails to encompass important normative considerations, the less effective it will be in optimally resolving legal disputes. Such proxies may, for instance, resolve cases on grounds that are irrelevant to the values at stake, leading to absurd results.[103]

There are three sub-factors that courts can examine when assessing how effective proxies are likely to be in a given situation. One is the complexity of the underlying concept. In general, the more complex the legal issue, the more difficult it will be to effectively capture it with a proxy value.[104] For instance, blank slates associated with the First Amendment may present especially complex issues, because issues of speech implicate numerous competing values and difficult definitional questions.[105] In such situations, it will be difficult to create a proxy test that captures all of the fundamental interests at stake. Accordingly, normative balancing tests are likely to be a more effective approach. Indeed, balancing tests are common in First Amendment law, especially in areas where courts had to promulgate tests with little textual or historical guidance.[106]

Another consideration is how stable a legal question is likely to be over time. The more likely it is that the context or normative calculus of a legal question will change over time, the less likely that a proxy value will effectively resolve the question in future cases. For instance, the use of property intrusion as a proxy standard for Fourth Amendment "search" failed in part because technology and law enforcement changed so radically that property was no longer an effective

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[103] For an example of a proxy rule causing cases to be decided on irrelevant grounds, *see infra* note **Error! Bookmark not defined.** and accompanying text.

[104] A concept might be complex if there are numerous, ambiguous, and/or conflicting values on either side of the issue. Simple concepts will generally not implicate many such values. A concept might also be simple if most of the normative considerations point strongly in one direction. So if the interests on one side of a normative balance are weighty and numerous, and those on the other side are trivial, that would reduce the complexity of the underlying issue and make it more likely that a proxy could capture it.

[105] *See infra* Part II.A.

[106] *See id*.

proxy for the normative calculus underlying the concept of a "search."[107] While it is difficult to foresee future change, some areas of law are more stable than others. In areas like government surveillance, where technological and social change has repeatedly destabilized proxy standards, balancing approaches may be more effective, holding all else equal.[108]

A third consideration is the breadth of the legal issue. The broader the legal question the court is addressing, and the more different types of cases that will be governed by a test, the less likely it is that a proxy value will be able to effectively resolve the cases. In other words, proxies will tend to perform best when addressing relatively narrow questions. Thus it may be difficult to forge a proxy to cover the entirety of all Fourth Amendment search questions. But a proxy may be optimal for addressing narrower questions of what police conduct is reasonable in particular search contexts.[109]

Second, how much easier is a potential proxy test to administer? The more a proxy value reduces decision costs and ambiguity in adjudication, the more likely it is to be a better choice than direct normative balancing. Thus, a proxy test may be quicker and easier to apply than a direct balancing test. In addition, a proxy may be easier to grasp conceptually than a normative test. A simpler, clearer legal concept may improve adjudication even if it does not reduce concrete adjudication costs like judicial time and effort.[110]

Not every proxy will reduce decision costs—certain proxies may be more difficult to adjudicate than a balancing test.[111] Likewise, the clarity and concreteness of legal proxies will vary substantially. Some will be far easier to grasp than a normative balancing approach,[112] some will be only slightly more tractable,[113] and some may be even harder to grasp conceptually than a balancing

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[107] *See supra* text accompanying note 67.
[108] This is also likely true of areas of law that often address transformative new technologies, like intellectual property. Areas like real property law or torts have certainly undergone transformative changes over time, but may be relatively stable and less sensitive to technological change.
[109] *See infra* Part II.E.
[110] Tokson, *supra* note 76, at 912–16 (discussing the difference between time and effort costs and the cognitive costs of processing new concepts).
[111] *See* Richard Re, *The Positive Law Floor*, 129 HARV. L. REV. FORUM 313, 320–26 (noting that, in many cases, using civil law as a proxy for the Fourth Amendment's scope would lead to confusion and indeterminacy).
[112] *See infra* Part II.E.
[113] *See infra* Part II.D.

test.[114]

Third, how likely are courts to be able to obtain and process the information necessary for effective normative balancing? The more information relevant to a normative balance that courts can collect and process, the more effective a direct balancing test will be. For instance, if courts are attempting to decide whether the statewide benefits of a regulation outweigh any burdens on interstate commerce, it will help to have government studies on the projected benefits and costs of the regulation, private or academic reports on its effects, general economics treatises, statistics on interstate trade flows in a particular industry, and other sources of relevant information.[115]

Such information may come from several sources. The government's briefs will generally contain relevant government statistics or reports. Briefs in general may contain "legislative facts" concerning social science, statistics, and economic data that can help courts address normative and policy issues.[116] Parties may call expert witnesses who collect or cite the relevant academic literature and prepare their own reports. Courts also have their own information-gathering capacities and may have access to useful "systemic facts" in frequently-litigated areas like criminal justice and procedure.[117]

When important aspects of a normative balance have been studied and courts are likely to obtain the relevant information from one of the above sources, it is more likely that courts can effectively apply a normative balancing test. If the relevant information cannot be accessed or there exists no concrete information on an issue, then courts may struggle to balance competing considerations. For instance, information regarding national security programs or the international effects of U.S. policies may be difficult to access.

Courts' ability to obtain relevant information is not the only important consideration; they must also be able to understand and apply the information. Judges may not be competent to deal with advanced econometric or technological data. In some cases, additional information may actually reduce the quality of decisions by overloading judges and making it more difficult to identify important

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[114] The *Katz* proxy test as applied has become extremely conceptually complex, incorporating at least four overlapping models of decisionmaking, including policy balancing as well as several others. *See* Kerr, *supra* note 3, at 507–22.
[115] *See infra* Part II.B.
[116] E.g., Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO L.J. 1, 30–31 (2013).
[117] Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2068–70 (2016).

data.[118] So the type and quality of information available, and not just its quantity, will be important in assessing whether courts are likely to effectively assess a normative balance.

Integrating the factors. In some cases, the above considerations will clearly weigh in favor of either direct balancing or a proxy value test. The paradigm balancing test situation is one that involves broad, complex issues on which there are helpful and available legislative or systemic facts. The paradigm proxy test situation occurs when an issue is relatively narrow and straightforward, relevant data is unavailable, and a proxy value exists that would be substantially easier to administer than a balancing test.

Most situations will not be so clear-cut. A potential proxy test may be easier to apply, yet the underlying issue may be so broad and complex that a proxy is unlikely to effectively represent the underlying normative balance. In general, the ability of the proxy to capture the normative balance will be the most important consideration. A proxy that fails to encompass fundamental values is likely to generate error costs that dwarf any benefits from easier decisionmaking.[119] But, in some contexts, a proxy value that is only moderately successful at capturing a normative balance may be optimal if it is far more administrable or if information vital to normative balancing is unavailable.

In general, information availability is less likely than the other factors to be a definitive consideration, in part because some useful legislative and systemic information is likely to be available for almost any substantial legal or policy question. Legal scholarship and other academic research often addresses novel issues and may be especially helpful to courts in cases where other sources of relevant information are scarce.[120] Nonetheless, information availability is a substantial factor in choosing between balancing and proxy regimes—especially when the decision is otherwise a close call.

This section has offered three key factors for courts to consider when choosing between a direct normative balancing test and a proxy value test. This meta-test

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[118] *E.g.*, Mark I. Hwang & Jerry W. Lin, *Information dimension, information overload and decision quality*, 25 J. INFO. SCI. 213 – 218 (1999); Gottlieb, *supra* note 78, at 858.

[119] *See* Matthew Tokson, *Knowledge and Fourth Amendment Privacy*, 111 Nw. U. L. REV. 139, 194 (2016) (describing how arbitrary standards for Fourth Amendment scope can lead to absurd results); Re, *supra* note 111, at 318 (discussing the arbitrariness of a positive law test for the Fourth Amendment's scope).

[120] This may be one explanation for the empirical finding that the Supreme Court "disproportionately uses legal scholarship when cases are … more difficult to decide". Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 1016 (2012).

does not encompass every consideration that might possibly bear on the decision.[121] In most cases, however, examining how well a proxy can capture the underlying balance, how much easier the proxy is to administer, and whether courts can obtain information relevant to balancing, will point courts towards the optimal choice.

3. Distinguishing and Incorporating Rules vs. Standards

The choice between normative balancing and proxy values is similar in some ways to the choice between rules and standards. Like any choice between two legal regimes, it involves comparing decision costs and error costs, and the factors described above are intended to help courts make this comparison.[122] But the two queries differ in many ways, and this section discusses their differences. It then incorporates some of the insights of the rules and standards literature into the choice between normative balancing and proxy approaches.

Balancing tests are a type of standard, one that weighs several factors against each other in order to yield a conclusion.[123] But proxy tests can be standards too.

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[121] For instance, it may be useful for courts to consider the importance of the average decision in a particular legal area. If reaching an accurate conclusion is especially important in terms of the number of people affected, economic value, national security, etc., then courts have reason to incur substantial decision costs in order to minimize erroneous decisions. *See* Gottlieb, *supra* note 78, at 856 (discussing optimal decisionmaking strategies). Accordingly, a legal test that is costly to apply but more likely to produce correct outcomes would be optimal in situations where the average legal case is likely to be important. Direct normative balancing tests may be more likely to produce correct decisions (along with high decision costs), and so may be optimal in high-importance contexts. However, this is complicated by the fact that sometimes normative balancing tests will produce more errors than proxy tests, such as when there is little available information relevant to the normative balance and there is an effective and concrete proxy value available. Further, some proxy values will carry higher decision costs than balancing tests, such as when a proxy standard is difficult to administer or has many complicated sub-layers. *See supra* note 111 and accompanying text. The importance of a particular legal issue may also be controversial and difficult to assess ex ante.

[122] *See, e.g.*, Richard A. Posner, *Employment Discrimination: Age Discrimination and Sexual Harassment*, 19 INT'L REV. L. & ECON. 421, 423 (1999) (discussing the costs of decisionmaking itself and the costs imposed by erroneous decisions).

[123] *See* Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60–61 (1992) (Referring to the process of balancing as a "standard-like regime."). There are many other kinds of standards as well. *E.g.*, CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 27–33 (1996) (discussing different types of standards and standard-like decisionmaking regimes). A classic standard would be a law that prohibits cars from driving at an "excessive" speed. *Id.* at 27.

For instance, the *Katz* test's "reasonable expectation of privacy" is a standard rather than a bright-line rule.[124] Likewise, the industry standards of care that determine reasonableness in some areas of tort law tend to be standards rather than bright-line rules.[125]

Indeed, bright-line rules are unlikely to be workable in many blank slate situations. Proxy rules will be most appropriate for relatively simple blank slates where normative considerations weigh heavily in favor of one outcome.[126] In less straightforward situations, courts using proxies are likely to favor proxy standards.

If a potential proxy test is a bright-line rule, then it will have the advantages of such rules, including predictability for private actors and consistency in adjudication.[127] It will also have the drawbacks, like over- or under-inclusiveness and the potential for evasion and loopholes.[128] These features of rules will be relevant to the choice between the proxy test and a direct balancing regime. But courts should still evaluate how well the potential proxy captures the normative values at issue, what information is available to courts, and how much more administrable the proxy is than a direct balancing test. Those questions need to be addressed whether the proxy test is a rule or a standard.[129]

Finally, legal tests can have multiple layers that encompass both rules and standards. A general, overarching test may incorporate several sub-tests that only apply in certain circumstances. For instance, a high-level normative balancing approach can, over time, yield numerous bright-line rules as courts "rulify" the law by creating sub-rules to address particular situations.[130] Negligence is a broad legal standard, but it encompasses rules like the one-bite rule and the last-clear-chance rule, among others.[131] Thus a normative balancing approach might ultimately produce a largely rule-based regime, with only very novel cases

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[124] *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
[125] *See, e.g.*, Tom Vesper, et al., *Retail Stores, Risk, and Res Ipsa*, TRIAL, August 2013, at 32, 34.
[126] *See infra* Part II.E*; see also supra* note 104.
[127] Sullivan, *supra* note 123, at 62–63.
[128] *Id.*
[129] Although considering the advantages and drawbacks of rules and standards as well as those of balancing tests and proxies may be time-consuming and costly, it is likely worthwhile. Cases that create new legal tests are frequently very important. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 595 (1992).
[130] *See* Coenen, *supra* note 79, at 654–55.
[131] *E.g.*, *Coogan v. Nelson*, 92 A.3d 213, 218 (R.I. 2014); *Fouts v. Builders Transp., Inc.*, 474 S.E.2d 746, 751 (Ga. App. 1996).

addressed by a balancing test.[132]

Likewise, a high-level proxy rule can incorporate numerous complex standards as it is applied. For example, some scholars have proposed a positive law test for the Fourth Amendment's scope, with a simple high-level rule: a police action is a search only if it is tortious or it violates some existing law.[133] But this rule embodies a multitude of complicated and amorphous standards, because many torts and laws use such standards.[134] The positive law test is thus far more difficult to apply than it might initially appear.[135] When considering the administrability of a proxy test, courts must take into account each layer of its application, not just the highest level.

II. BLANK SLATES IN THE COURTS

Blank slates represent extreme cases of legal indeterminacy. Yet they are not especially rare and can be found in a variety of areas of law. Often, they involve significant public policy issues or shape some of our most fundamental constitutional rights.[136]

This section gives an overview of legal blank slates and examines how courts have addressed them. These summaries are necessarily brief and may not cover every potential formal argument or creative historical claim. Nonetheless, the situations described below presented courts with minimal formal guidance or constraint in cases that called for a legal test to guide future decisions. These examples can illuminate the different approaches courts can take to blank slates and offer lessons for courts facing similar situations in the future.

A. Content-Neutral Restrictions on Speech

The First Amendment's guarantee of free speech raised numerous issues on which text, history, and purpose presented little guidance. Courts have gradually

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[132] *See infra* Part III.C.

[133] *E.g.*, Baude & Stern, *supra* note 92, at 1829–33 (also proposing that actions that use the unique authority of the government to obtain information be considered searches).

[134] Re, *supra* note 111, at 320–21.

[135] *Id.*

[136] *See infra* Part II. Blank slates often arise as Courts address the Bill of Rights, which frequently features vague, general text and very little direct legislative or other history. *See, e.g.* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1032 (2011).

filled in many of these blank slates over the course of the past century. Typically, courts have done so with balancing tests, which are pervasive in First Amendment law.[137]

The text of the First Amendment's free speech clause prohibits "abridging the freedom of speech"—a rather short phrase that is both abstract and ambiguous.[138] As David Strauss has noted, "[i]t is not obvious what constitutes an abridgement, and it is not obvious what constitutes the freedom of speech."[139] About all that is clear is that the First Amendment does not prohibit all abridgements of speech, because laws regulating things like copyrights, espionage, and perjury are largely unaffected by the First Amendment.[140]

The text does appear to limit the Amendment's scope to laws made by "Congress,"[141] but courts have implicitly rejected any such limit, applying the Amendment to state laws and judicial prior restraints.[142] A contrary interpretation would allow the states or the judiciary to restrict speech without constitutional regulation—a potentially disastrous outcome in normative terms and one that might undermine any meaningful "freedom of speech." Thus the "Congress" provision of the First Amendment has not been interpreted as a hard limit on the scope of the constitutional right.

The general ambiguity of the First Amendment's text is compounded by its history. The legislative history of the Amendment sheds almost no light on its

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[137] *E.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 386 (2009) ("[B]alancing tests generally prevail in First Amendment analysis"); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 779 (2001) (describing the pervasiveness of the "balancing-test approach" to the First Amendment).

[138] STRAUSS, *supra* note 37, at 57 (the text of the First Amendment "simply does not tell us much"); Mendelson, *supra* note 84, at 821("[T]he language of the first amendment is highly ambiguous.").

[139] STRAUSS, *supra* note 37 at 57; *see also*, *e.g.*, G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 891 (2002) ("[T]he Amendment neither defines "speech" nor explains what kinds of laws constitute "abridging" freedom of speech. The history of the Amendment is also uninformative.").

[140] Melville B. Nimmer, *The Right to Speak Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 937 (1968); *see also* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971) (explaining why a reading of the First Amendment that prohibits any and all restraints on communication "is, of course, impossible.").

[141] U.S. CONST. amend I.

[142] *See generally* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1209 (1986) (analyzing the issue in detail). Following the incorporation of the First Amendment into the Fourteenth Amendment's guarantee of due process, courts have also consistently applied the free speech guarantee to the states. *Id.* at 1210–11.

scope or meaning, especially with respect to free speech.[143] There are no records of the Senate deliberations or the relevant ratification debates in the state legislatures.[144] The House debates are not illuminating either.[145] Moreover, the concept of freedom of speech, at least as a cognizable legal right, "had almost no history as a concept or a practice prior to the [ratification of the] First Amendment or even later."[146]

In the early post-Founding period, the nature of the free speech right was contested and unclear. Generally, the Amendment was understood to provide total protection against prior restraints on speech but only limited protection against after-the-fact punishment.[147] The constitutionality of criminalizing seditious speech was an open question, and political leaders tended to change positions on sedition laws depending on whether they held power.[148] Ultimately, "[t]he framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject."[149]

In the 1960s, following a vigorous debate, the Supreme Court did interpret the First Amendment to provide nearly absolute protection against viewpoint-based restrictions on speech by private citizens.[150] This is a plausible (though not definitive) interpretation of the First Amendment's protection of the "freedom of speech". But what about laws that only incidentally affect speech, or laws that regulate the speech of government employees or commercial entities? Neither text

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[143] FREEDOM OF EXPRESSION IN THE SUPREME COURT xvii (Terry Eastland, ed.) (2000).
[144] *Id.*
[145] *Id.*
[146] LEONARD W. LEVY, LEGACY OF SUPPRESSION 5 (1960) ("[Freedom of speech] developed as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion--the freedom to speak openly on religious matters. But as an independent concept referring to a citizen's personal right to speak his mind, freedom of speech was a very late development, virtually a new concept without basis in everyday experience and nearly unknown to legal and constitutional history or to libertarian thought on either side of the Atlantic prior to the First Amendment."); cf. [Jud Campbell article in Yale L J] (contending that free speech was known to late 18th-century legal elites as a largely non-enforceable natural rights concept).
[147] *E.g.*, Lakier, *supra* note 68, at 2179.
[148] *See, e.g.*, Mendelson, *supra* note 84, at 822 (quoting both Jefferson's endorsement of free expression principles and his later, vigorous endorsement of prosecutions of opposition journalists); Bork, *supra* note 140, at 22 (noting that libertarian views about the First Amendment were not widely held even among Jeffersonians, and Jefferson himself approved of state prosecutions for seditious libel).
[149] Bork, *supra* note 140, at 22; see *also* Zechariah Chafee, Jr., *Book Review*, 62 HARV. L. REV. 891, 898 (1949) ("The truth is, I think, that the framers had no very clear idea as to what they meant by 'the freedom of speech or of the press.').
[150] *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

nor any other formal source provides useful guidance on these ancillary questions.

Over the course of the last century, the Supreme Court has gradually filled in these blank slates, typically using balancing tests. The Court's first, tentative step towards balancing came in 1939's *Schneider v. New Jersey*, where the court struck down ordinances banning the distribution of pamphlets in certain public places.[151] The Court reasoned that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it" and noted that narrower means like simply punishing littering could accomplish the same goal.[152] In 1940s cases, the Court expressly stated that "courts must balance"[153] and "weigh[]"[154] community interests against free speech values in cases involving time, place, or manner restrictions on speech.

In the 1980s, this balancing approach was formalized into an intermediate scrutiny test. Under this test, a time, place, or manner restriction is valid if it is "narrowly tailored to serve a significant governmental interest," and "leave[s] open ample alternative channels for communication of the information."[155] The intermediate scrutiny test is essentially a balancing test,[156] one that requires courts to "strike an appropriate balance between achieving [government] goals and protecting constitutional rights."[157] If the benefits of a non-content restriction are minor, they will not justify incidental burdens on speech.[158] If the benefits are substantial, they likely will justify such burdens.[159]

Intermediate scrutiny and related balancing tests now cover a wide variety of First Amendment issues. Regulations of commercial speech, symbolic conduct (like burning a draft card), cable television, "adult" businesses, and charitable solicitation are assessed under various forms and variants of the intermediate

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[151] 308 U.S. 147, 162–65 (1939).
[152] *Id.* at 162.
[153] *Saia v. New York*, 334 U.S. 558, 562 (1948).
[154] *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).
[155] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
[156] *E.g.*, Blocher, *supra* note 137, at 392.
[157] *Blount v. SEC*, 61 F.3d 938, 946 (D.C. Cir. 1995); *see also Casey v. City of Newport, R.I.*, 308 F.3d 106, 116 (1st Cir. 2002) ("Inescapably, the application of the narrow tailoring test entails a delicate balancing judgment by the court"); *Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992) ("Despite the seemingly mathematical character of the metaphor, the Supreme Court in fact applies [the narrow-tailoring requirement] as a balancing test".).
[158] *Henderson*, 964 F.2d at 1184–85.
[159] *Ward v. Rock Against Racism*, 491 U.S. 781, 799–802 (1989).

scrutiny test.[160] Speech by government employees is governed by an unstructured balancing test that aims "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[161]

Blank slate theory can help to explain why balancing tests appear so frequently in First Amendment law. The First Amendment embodies complex normative questions involving the value of free expression and political discourse.[162] It is hard to locate a single value or proxy test to stand in for the "exposition of ideas,"[163] "the protection of political dissent,"[164] "the advancement of truth, science, morality, and arts in general,"[165] and all the other values served by the freedom of speech.[166] Moreover, the blank slates covered by intermediate scrutiny and related balancing tests tend to be broad, encompassing, for example, all instances of commercial speech or all non-content speech regulations. In situations like these, balancing is likely to be the optimal decisionmaking regime and effective proxy values will be difficult to find.

B. The Dormant Commerce Clause

The Commerce Clause empowers Congress to regulate "Commerce…among the several States."[167] In the landmark cases of *Gibbons v. Ogden*[168] and *Willson v. Black Bird Creek Marsh Co.* [169], the Supreme Court found that the states cannot interfere with Congress's power to regulate interstate commerce.[170] The

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[160] Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 791–99 (2007).
[161] *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).
[162] *E.g.*, Blocher, *supra* note 137, at 393–97.
[163] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
[164] Blocher, *supra* note 137, at 396 (summarizing *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)).
[165] *Roth v. United States*, 354 U.S. 476, 484 (1957).
[166] *See, e.g.*, Owen M. Fiss, *Why the State?,* 100 HARV. L. REV. 781, 784–86 (1987); 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774) (noting the value of press freedom of expression lies "in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.'").
[167] U.S. CONST. art. I, §8, cl. 3.
[168] 22 U.S. 1 (1824).
[169] 27 U.S. 245 (1829).
[170] *E.g.*, *id.* at 252.

Commerce Clause has power even "in its dormant state," and this dormant Commerce Clause prevents the states from usurping Congress's commerce powers.[171]

To be clear, the question of the dormant Commerce Clause's existence is not a blank slate. Textualism gives a clear answer: it does not exist.[172] History and intent may also provide useful guidance.[173] Nor does the question call for a test—either the dormant Commerce Clause exists or it does not. Moreover, the Supreme Court has recognized the dormant Commerce Clause for nearly 200 years, and the first precedents were written by Chief Justice Marshall himself. The question is disputed, but the slate is far from blank.

For our purposes, suffice it to say that the dormant Commerce Clause is well-established law that continues to limit state power today. But, at least initially, courts lacked guidance as to the scope or content of the dormant Clause.[174] In other words, it was unclear exactly when a state violated the dormant Commerce Clause by unlawfully infringing on Congress's powers. There was, of course, no textual or legislative history evidence on the issue, and the Supreme Court's foundational precedents did not address the matter either.[175] A blank slate arose.

The Supreme Court initially struggled to establish a test for determining when a state law violated the Dormant Commerce Clause. It took its first steps in *Cooley v. Board of Warrens*,[176] noting that some subjects are "in their nature national, or admit only of one uniform system, or plan of regulation,"[177] and these subjects "require exclusive legislation by Congress."[178] The Court did not, however, explain what these subjects might be or how to identify them and instead confined its opinion to the precise question of laws regarding boat pilots.[179] *Cooley* stated a

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[171] *Id.*
[172] *See, e.g.*, *Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting).
[173] Authorities dispute whether the Framers intended courts to strike down state laws that impinge on Congress's commerce power. *Compare* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37 (2006) (contending that ample historical foundation exists to support the dormant Commerce Clause), *with Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 264–65 (1987)(Scalia, J., concurring in part and dissenting in part) (contending that the Framers "almost certainly" did not intend to create a dormant Commerce Clause).
[174] *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 577 (1987).
[175] *See id.*
[176] 53 U.S. 299 (1851).
[177] *Id.* at 319.
[178] *Id.*
[179] *Id.* at 320.

principle but did not promulgate a workable test.

In the decades after *Cooley*, the Court was likewise unable to establish a concrete test, and the rationales of its cases were often inconsistent.[180] Some cases incorporated elements of balancing, considering whether state regulations served a legitimate purpose without unreasonably burdening interstate commerce.[181] In others, the Court looked to vague, undefined standards like whether a state regulation was a "direct" or "indirect" burden on interstate commerce.[182] Ultimately, the "direct burden" standard could not withstand criticism from dissenting Justices[183] and scholars,[184] and the Court dropped it in favor of directly balancing the efficacy of a state law against the "national interest in keeping interstate commerce free from interferences."[185] In modern cases, facially neutral state regulations are evaluated under the "*Pike* balancing" test, under which such regulations "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits."[186]

The scope and content of the dormant Commerce Clause was a paradigmatic blank slate, a legal question on which there was no direct history or intent and no text at all. The Court struggled for over a century to elaborate a test for determining whether a state regulation violated the dormant Clause. It repeatedly failed to develop a workable proxy standard and ultimately adopted a balancing test that expressly weighs local benefits against the harms imposed on interstate commerce. The adoption of a balancing approach was perhaps less inevitable here than in First Amendment law. The normative considerations underlying the dormant Commerce Clause are largely practical and not as complex or as varied as those behind the First Amendment.[187] However, the blank slate here is broad, potentially encompassing all state regulations that affect interstate commerce. It

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[180] *See* Ronald D. Rotunda & John E. Nowak, 2 TREATISE ON CONST. L. § 11.6(a) (2016).
[181] *See, e.g.*, *Reid v. Colorado*, 187 U.S. 137, 151 (1902); *Railroad Co. v. Husen*, 95 U.S. 465, 470–72 (1877); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).
[182] *Di Santo v. Pennsylvania*, 273 U.S. 34, 37 (1927).
[183] *Di Santo*, 273 U.S. at 43 (Stone, J., dissenting).
[184] Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).
[185] *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 775–76 (1945).
[186] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). State laws that overtly discriminate against interstate commerce will be struck down "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism," a standard analogous to strict scrutiny. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992).
[187] These considerations include the efficiency benefits of uniform federal regulation of interstate trade, the informational and democratic benefits of allowing states to regulate intrastate commerce, and the practical difficulty for Congress of policing every state infringement on interstate commerce. *See, e.g.*, *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 669–70 (1981); Henkin, *supra* note 25, at 1041.

is also likely that courts will have access to high-quality information relevant to the normative questions surrounding state regulations that affect interstate commerce. The federal government, the states, and affected industry groups will frequently be parties or amici in dormant Commerce Clause litigation and can provide courts with information on the purported benefits of state regulations and the potential impacts on interstate trade. Moreover, the Court attempted to create proxy standards several times, and those proxies failed for lack of coherence and administrability.[188] In these circumstances, the direct normative balancing adopted by the Court is probably the optimal approach.

C. The Scope of the Fourth Amendment

1. Text and Context

a. "Searches"

The text of the Fourth Amendment reads, in full:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[189]

The Amendment plainly applies to "searches." But what does "search" mean here? The term is not defined in the text, and in general it has several possible meanings.[190] A search might be an abstract inquiry, like the "search [for] truth."[191] It might be any act of "seeking"[192] or "looking for"[193] something, like searching for a place to eat. Alternatively, it could refer to the close "examination"[194] of a thing, like the examination of a letter.[195] Or it could refer to the physical act of inspecting

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[188] *See Cooley*, 53 U.S. at 319; *Di Santo*, 273 U.S. at 37.
[189] U.S. CONST. amend. IV.
[190] Kerr, *supra* note 65, at 70.
[191] *Search n.*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).
[192] *Search s. from the verb*, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1792); *Search, n.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("scrutiny for the purpose of finding a person or thing").
[193] *A Search*, NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (1783).
[194] JOHNSON, *supra* note 192; *Search, v.*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).
[195] Kerr, *supra* note 65, at 70; OXFORD ENGLISH DICTIONARY, supra note 194.

a particular space,[196] as in "to search the house for a book."[197]

Yet the term "searches" is not just ambiguous in the abstract. In the context of the Fourth Amendment, it is almost wholly indeterminate. From the earliest days of Fourth Amendment jurisprudence, the Supreme Court has interpreted the text and structure of the Fourth Amendment to mean that "reasonable" searches typically require a warrant and probable cause.[198] Even the exceptions to this rule generally require at least some quantum of suspicion.[199] Thus the question of what constitutes a Fourth Amendment search is a crucial one—"searches" usually require probable cause, while the police can engage in non-searches without any suspicion or any meaningful limits on the extent or duration of their investigation.[200] But the term "searches" gives no indication of how courts should draw the line between a search and a non-search in this context.

Scholars have generally acknowledged that the scope of the term "search" is not apparent from the text.[201] One exception is Akhil Amar, who has suggested that "search" should be construed broadly, covering any act of looking at

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[196] *Id.*

[197] WEBSTER, *supra* note 191. One of several definitions provided by Johnson cites Milton and refers to search as "Enquiry by looking into every suspected place." JOHNSON, *supra* note 192.

[198] *See, e.g., See Ex parte Jackson*, 96 U.S. 727, 733 (1877); *Weeks v. United States*, 232 U.S. 383, 393 (1914); *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). In practice, the warrant requirement is subject to numerous exceptions, and courts now evaluate some government searches against a pure reasonableness standard. *E.g.*, *United States v. Knights*, 534 U.S. 112, 117–18 (2001); *Carroll v. United States*, 267 U.S. 132, 153 (1925).

[199] *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

[200] The history of "non-search" surveillance is rife with examples of abuse and excessive monitoring of citizens. *See, e.g.*, ALEXANDER CHARNS, CLOAK AND GAVEL: FBI WIRETAPS, BUGS, INFORMERS, AND THE SUPREME COURT (1992); Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY (May 11, 2006), http://usatoday30.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

[201] *See* David Alan Sklansky, *Two More Ways Not to Think About Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223 (2015) ("One can perhaps extract from this language the traditional rule exempting searches of open fields from constitutional protection, but not much else."); Kerr, *supra* note 65, at 70 ("The ambiguity of the word ensures that a wide range of concepts might plausibly define the meaning of searches."); Wasserstrom & Seidman, *supra* note 66, at 27 ("Indeed, it is hard to see how the Court could resolve the issues it regularly confronts through a purely textual approach. For example, 'search' and 'seizure' are hardly self-defining. Although one can debate whether 'reasonable expectation of privacy' gives them appropriate content, there can be no dispute that the Court had to look outside the text to give them meaning.").

something or any gathering of information.[202] But Amar does not address the alternative definitions of "search" or offer any evidence to support choosing the expansive definition.[203] More importantly for our purposes, Amar's interpretation does not answer the core question presented in most Fourth Amendment scope cases—when can the government obtain information on an individual when it lacks any grounds to suspect her of a crime? Under Amar's approach, the government could search a person without suspicion if doing so were "reasonable," but reasonableness is an amorphous, "common-sense" concept that gives no direct formal guidance.[204] Amar's approach would merely relocate the blank slate from the "search" component of the Fourth Amendment to its "reasonableness" component.

Moreover, Amar's approach would require eliminating the warrant requirement as a default rule.[205] It is unnecessary here to evaluate whether eliminating the warrant requirement would be normatively desirable.[206] Suffice it

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[202] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 769, 811 (1994).). David Gray makes a similar argument in DAVID GRAY, THE FOURTH AMENDMENT IN THE AGE OF SURVEILLANCE (2017).

[203] This may be because the scope of "search" is not the focus of his Fourth Amendment interpretation; the main thrust of his argument is that the Fourth Amendment does not require or favor the use of warrants, but only mandates that searches be generally reasonable. *Id.* at 759. Amar also concedes that his definition of search would give the Fourth Amendment enormous scope, subjecting huge quantities of government action to potential judicial scrutiny and swallowing up the entirety of substantive due process law and parts of equal protection. *Id.* at 811.

[204] *Id.* at 801 (proposing a substantive test for reasonableness based on what "[c]ommon sense tells us.") Amar also notes that, because the Justices have generally required a warrant and/or probable cause for most Fourth Amendment searches, they "have spent surprisingly little time self-consciously reflecting on what, exactly, makes for a substantively unreasonable search or seizure." *Id.*

[205] See *id.* at 761 (proposing eliminating the warrant requirement).

[206] Unlike the *Katz* test for Fourth Amendment scope, the warrant requirement has not come under widespread scholarly attack. Instead, many scholars have lamented its erosion by exceptions and "special needs" cases. *See, e.g.*, Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531 (1997); Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89 (1992); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991). There is also a robust debate over whether the Fourth Amendment's ambiguous history supports or undermines the warrant requirement. *Compare* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181 (2016) ("reasonable" searches and seizures usually require warrants because warrantless searches and seizures would have typically violated the common law); Davies, *supra* note 66, at 738 (a warrant requirement more closely approximates the unrecoverable original intent); WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791, lxvi (2009) ("[S]pecific warrants were mandatory and were intended to be the conventional method of search and seizure."), *with* Amar, *supra* note 202, at 761–

to say that the rule has been at the heart of Fourth Amendment jurisprudence since its inception,[207] and so long as it exists, an extremely broad reading of "search" is unworkable. The scope of the "search" concept remains a mystery, especially in the context of a body of law that favors warrants and suspicion before the police can search.

b. "Persons, Houses, Papers, and Effects"

The Fourth Amendment protects people's right to be secure in their "persons, houses, papers, and effects." These categories are fairly capacious, but can be read as providing at least some textual limits on the scope of the Fourth Amendment. Things not listed in this clause may be ineligible for Fourth Amendment protection, in accord with the traditional canon of construction *expressio unius*.[208]

This was the Supreme Court's interpretation in 1928's *Olmstead v. United States*, where the Court held that the Fourth Amendment did not apply to conversations because they were not material things like "papers" or "effects."[209] Yet the Court overruled *Olmstead* in 1967, ruling that the Fourth Amendment could apply to intangible things.[210] The *Olmstead* approach has virtually no defenders today, even among originalists.[211] Instead, the clause is generally interpreted to be illustrative, providing examples of things that are protected by

71 (history indicates no warrant requirement); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 46–47 (1969) (same).

[207] *See Ex parte Jackson*, 96 U.S. at 733; *Weeks*, 232 U.S. at 393.

[208] "Expressio unius est esclusio alterius," i.e., "the express mention of one thing excludes all others," generally means that a list of items excludes similar items not listed.

[209] *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

[210] *Katz v. United States*, 389 U.S. 347, 353 (1967). The Court has likewise extended the Amendment's reach to commercial property, despite its absence from the list. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311–12 (1978). However, the rule that physical intrusion on "open fields" is not a Fourth Amendment search remains good law. *Oliver v. United States*, 466 U.S. 170, 183–84 (1984).

[211] Originalists who have weighed in on the matter have generally endorsed *Katz*'s extension of Fourth Amendment protection to intangible things like telephone conversations. *See* Amar, *supra* note 202, at 781; Robert Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986); RAOUL BERGER, DEATH PENALTIES 73 (1982); *see also* Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 882 (2014) (acknowledging that the Fourth Amendment must cover intangible things as well as physical trespasses in order to serve core Fourth Amendment values), *but cf.* David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1053 (2004) (arguing on historical grounds that the Fourth Amendment prohibits only physical searches of houses).

the Fourth Amendment rather than strictly limiting its coverage.[212]

Moreover, even if the *Olmstead* interpretation were adopted, the Fourth Amendment's text would still offer no formal guidance to courts in a huge portion of cases. There are myriad difficult questions of scope involving persons (facial recognition programs, CCTV or satellite monitoring), houses (infrared scanners,[213] drug-sniffing dogs,[214] drone and airplane surveillance[215]), "papers" (emails,[216] text messages,[217] instant messages), and effects (cell phone tracking,[218] automobile GPS tracking,[219] license plate monitoring). Courts will find no answers to these questions in the Fourth Amendment's text.

2. History and Purpose

There is very little direct historical evidence relating to the Fourth Amendment's scope.[220] Indeed, the Founding-era history of the Fourth Amendment as a whole is sparse and ambiguous.[221] Although conjectures can be made about its general historical meaning, there is virtually no clear guidance for courts trying to determine when the Fourth Amendment applies.

Indeed, there are remarkably few Founding-era statements on the Fourth Amendment by framers or legislators, and virtually none concerning the Amendment's scope. There was no discussion of a search and seizure provision

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[212] *See, e.g.*, BERGER, *supra* note 211, at 73 ("'Of course the fourth amendment…goes beyond physical searches to comprehend wiretaps and electronic surveillance. They are analogous to what was prohibited and illustrate the application of principle to similar facts."). One reason the *Olmstead* interpretation has few defenders may be that its consequences for privacy and the rule of law were disastrous. *See* Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 583 (2011).
[213] *Kyllo v. United States*, 533 U.S. 27 (2001).
[214] *Florida v. Jardines*, 133 S. Ct. 1409 (2013).
[215] *See California v. Ciraolo*, 476 U.S. 207 (1986).
[216] *Warshak v. United States*, 631 F.3d 266, 287 (6th Cir. 2010) (*Warshak III*).
[217] *City of Ontario v. Quon*, 560 U.S. 746 (2010).
[218] *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 612 (5th Cir. 2013).
[219] *United States v. Jones*, 132 S. Ct. 945 (2012).
[220] *See, e.g.*, Kerr, *supra* note 65, at 70–72.
[221] *See* Clancy, *supra* note 136, at 983 (finding that "there is no consensus regarding the details or meaning of the historical record"); Davies, *supra* note 66, at, 551 ("the participants in the historical controversies that stimulated the framing of the Fourth Amendment simply did not discuss when a warrant was required."); Wasserstrom & Seidman, *supra* note 66, at 78 ("[A]t least in the fourth amendment context, the words, structure, and history do not yield a determinate outcome.") (internal quotation marks omitted); TAYLOR, *supra* note 206, at 43 ("Nothing in the legislative or other history of the fourth amendment sheds much light on the purpose of [its] first clause.").

at the Constitutional Convention.[222] The subsequent debate over a potential bill of rights "rarely involved delving into the details of an enumeration of a bill of rights" but focused instead on the general need for rights protections.[223] The few, isolated references to protection against searches and seizures were "themselves vague assertions, consisting of little more than a phrase or a sentence or two."[224] These generally raised concerns about the use of general warrants, the potentially unlimited powers of government officials, and the protection of the home.[225]

James Madison initially drafted the Fourth Amendment, which resembled in structure Article 14 of the Massachusetts Declaration of Rights, itself drafted by John Adams.[226] Madison gave no explanation of the Amendment beyond an intent to deter general warrants,[227] and there is no record of any comment by Adams on the Massachusetts search and seizure provision.[228] The Fourth Amendment generated virtually no recorded debate in Congress.[229] State records regarding the ratification of the Amendment reveal that "[n]one of [the state legislative] journals preserves a single utterance by a state legislator on the right respecting search and seizure."[230] The silence is daunting.

Likewise, the broader Founding-era history surrounding the Fourth Amendment provides virtually no useful guidance to courts deciding cases involving the Fourth Amendment's scope. The most influential part of that history involves a series of abuses by King George III and his officers that raised concerns in the Colonies about unreasonable searches and seizures.[231] In *Wilkes v. Wood* and *Entick v. Carrington*, for example, English officers empowered by general warrants entered and searched the homes of citizens suspected of libel against the King.[232] The homeowners sued for trespass and won substantial damage awards.[233]

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[222] Clancy, *supra* note 136, at 1029.
[223] *Id.* at 1032.
[224] *Id.* Clancy also notes that "There are no tracts or detailed discussions about a search and seizure provision." *Id.* at 1033–34.
[225] *Id.* at 1033.
[226] *Id.* at 1027, 1044.
[227] *Id.* at 1045–46
[228] *Id.* at 1028
[229] *Id.* at 1047, 1051.
[230] CUDDIHY, *supra* note 206, at 713. ("To the extent that the direct evidence indicates, the amendment's ratifiers took their thoughts about its original meaning to the grave.").
[231] Kerr, *supra* note 65, at 70.
[232] *Wilkes v. Wood*, 98 Eng. Rep. 489, 499 (C.P. 1763); *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765).
[233] *Wilkes*, 98 Eng. Rep. at 498 (jury awarded 1,000 pounds in damages); *Entick*, 19 Howell's State Trials at 1036 (jury awarded 300 pounds in damages); *see generally* Amar, *supra* note 202, at 798, 814 (discussing punitive damages in early trespass cases).

These cases suggest that a government official entering one's home, looking around inside, and going through one's belongings was the paradigmatic Fourth Amendment search.[234] This comports with the text and drafting history of the Amendment, both of which reflect a concern with general warrants and the inspection of private homes.[235]

Today, the idea that the physical inspection of a house by government officials is a search is uncontroversial. It is the clearest possible example of a search, one end of a vast spectrum ranging from obvious searches to obvious non-searches. It provides little guidance to a court trying to determine whether some other type of government activity is a search. As Orin Kerr has noted, "Examples alone cannot identify how far beyond their facts the principle should extend."[236]

Nor is there doctrinal or historical support for limiting the Fourth Amendment's scope to trespasses only. Indeed, it appears that no jurist or scholar advocates such an approach.[237] To be sure, the pre-Founding cases involved real property trespass actions, and most Founding-era searches would have required physical intrusion, because most nonphysical means of surveillance had not yet been invented.[238] But there is no evidence that the Framers intended to limit the concept of searches to only those contexts that commonly arose in 1791, or that the contemporary remedy of trespass liability was meant to somehow limit the extent of "searches."[239] And there is little basis for arguing that "searches" should be read to include only the specific searches that existed at the time of ratification. The Supreme Court emphatically rejected a similar argument regarding "arms" in the

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[234] Kerr, *supra* note 65, at 72.

[235] Incidentally, there is no clear founding-era evidence that physical inspections of vehicles or chattels outside the home were Fourth Amendment searches, and the first Congress authorized suspicionless inspections of certain vehicles and non-residential buildings. *See, e.g.*, Lawrence Rosenthal, *An Empirical Inquiry into the Use of Originalism in Constitutional Adjudication* (forthcoming) (manuscript on file with author, p. 42).

[236] Kerr, *supra* note 65, at 73.

[237] *Cf. United States v. Jones*, 132 S. Ct. 945, 953 (2012) (employing a trespass-like concept but noting that *Katz* would continue to govern non-physical searches involving electronic signals); Sacharoff, *supra* note 211, at 882 (proposing a trespass-based approach to the Fourth Amendment's scope in addition to a separate privacy-based test); Amar, *supra* note 202, at 769, 781, 811 (advocating a trespass-like remedy for Fourth Amendment violations but also a broad interpretation of search that covers intangible as well as tangible things).

[238] Also, subpoenas for documents in criminal proceedings were unheard of in the pre-founding era, and were generally rejected in civil proceedings as well. *See Entick, v. Carrington*, (1765) 19 Howell's State Trials (C.B.) at 1073 ("There is no process against papers in civil causes ….[though] [i]t has often been tried….In the criminal law such a proceeding was never heard of.").

[239] Kerr, *supra* note 65, at 74–76; Sacharoff, *supra* note 211, at 898.

Second Amendment:

> Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.[240]

As the Court itself notes, the same can be said of searches that did not exist at the founding.

None of this is to say that trespass concepts should never be a part of Fourth Amendment law,[241] or that history cannot serve as an inspiration for new proposals in this area.[242] The point is simply that history itself gives us little concrete guidance in determining what exactly is and is not a Fourth Amendment search. It can inspire us, but it does not compel us.

Thus, beyond the uncontroversial principles that the physical inspection of a house is a search and that general warrants are unlawful, the lessons of history tend to be very broad and abstract.[243] The bedrock purpose of the Fourth Amendment was to protect privacy, property, and liberty from undue intrusions by government officers.[244] This purpose is reflected in the Framers' rejection of

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[240] *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008).

[241] Laurent Sacharoff has argued that trespass concepts should be incorporated into existing Fourth Amendment scope law. Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 882–83 (2014).

[242] *See, e.g.*, Amar, *supra* note 202, at 814–16 (advocating various new institutions for regulating law enforcement, inspired by his historical analysis, including a "Fourth Amendment Fund" to educate Americans about the Amendment, attorney's fees awards for successful plaintiffs, and citizen review panels overseen by administrative agencies).

[243] *See* Morgan Cloud, *Searching through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1746 (1996).

[244] *Id.* at 1726 ("[T]he historical record suggests that objections to general warrants and general searches alike rested upon broad concerns about protecting privacy, property, and liberty from unwarranted and unlimited intrusions."); CUDDIHY, *supra* note 206, at 766 ("Privacy was the bedrock concern of the amendment, not general warrants."); Davies, *supra* note 66, at 744–45 ("it is certainly the case that the Framers intended to preserve a personal and domestic sphere that would be meaningfully protected against undue intrusions by government officers"); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property.").

general and invalid warrants, which were the primary means of authorizing intrusions in an era before professionalized police forces or laws against resisting law enforcement officers.[245] But how this general purpose should manifest in individual cases remains unclear.

3. Past and Present Fourth Amendment Tests

In the early days of the republic, the Fourth Amendment rarely came up in reported cases.[246] Early Fourth Amendment "search" cases generally invoked either property,[247] or privacy,[248] or both.[249] There was not yet any conflict between these two concepts. That changed in *Olmstead*, where the Court held that the government could record conversations so long as they did not physically intrude on constitutionally protected forms of property.[250]

The consequences of *Olmstead* were ruinous for privacy and citizen security, as the government used its largely unfettered wiretapping power to monitor a vast array of private conversations and to threaten disfavored political groups and civil rights leaders.[251] Eventually, the failures of *Olmstead*'s property-focused approach led to the replacement of the property regime with a new Fourth Amendment test.[252] Under this "*Katz* test," if the government violates people's "reasonable expectations of privacy"[253]—defined in various cases by reference to concepts like

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[245] Davies, *supra* note 66, at 552, 554, 620, 623–27 (discussing how controlling warrants was an effective means of controlling Founding-era law-enforcement officers and describing how the context and practice of law enforcement has radically changed since the Founding).
[246] *Id.* at 613. The Fourth Amendment did not apply to the states until 1949. *Wolf v. Colorado*, 338 U.S. 25, 28–29 (1949).
[247] *See United States v. Lee*, 274 U.S. 559, 563 (1927) (finding no search of a boat because the Coast Guard observed its decks visually from a distance and did not physically explore the boat).
[248] *See United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.")
[249] *See Perlman v. United States*, 247 U.S. 7, 13 (1918) (discussing Fourth and Fifth Amendment principles and noting that all of them involved "force or threats or trespass upon property [or] some invasion of privacy."); *Boyd*, 116 U.S. at 630 (discussing intrusions on both property and the "privacies of life").
[250] *Olmstead v. United States*, 277 U.S. 438, 457, 464 (1928).
[251] *See, e.g.*, Tokson, *supra* note 212, at 583.
[252] *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
[253] *See Oliver v. United States*, 466 U.S. 170, 178 (1984).

probability,[254] social norms,[255] existing law,[256] or normative considerations[257]—then it has committed a search.[258] The *Katz* test is a proxy test—courts applying it use citizens' expectations of privacy as a proxy for the underlying balance between the competing values of privacy and the effectiveness of law enforcement.

Katz has been the dominant test ever since, although it was recently supplemented by the Court in a pair of cases involving tangible property. These cases added a "physical touching" test, under which certain types of physical intrusion onto property are also Fourth Amendment "searches" even if they would not otherwise be searches under the *Katz* test.[259] In these cases, the physical touching without permission of a citizen's property, no matter how minimal, is used as a proxy standard that determines the Fourth Amendment's scope.

Thus the Supreme Court's approach to the blank slate of Fourth Amendment scope has been to adopt various proxy tests—first physical trespasses on property, then reasonable expectations of privacy, and now a test that encompasses both reasonable expectations and physical touching for information-gathering purposes.

It is debatable whether a proxy approach was the optimal strategy for developing a Fourth Amendment test, given the complexity of the issues surrounding government surveillance and personal privacy and the tendency of new technologies to destabilize Fourth Amendment law. Certainly, the *Katz* test has been emphatically and almost universally criticized.[260] It is incoherent,[261]

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[254] *Bond v. United States*, 529 U.S. 334, 338–39 (2000).
[255] *Georgia v. Randolph*, 547 U.S. 103, 113–14 (2006).
[256] *Florida v. Riley*, 488 U.S. 445, 451 (1989).
[257] *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984).
[258] *Oliver*, 466 U.S. at 178; *see generally* Kerr, *supra* note 3, at 507–22.
[259] *Florida v. Jardines*, 133 S. Ct. 1409, 1415–17 (2013).
[260] *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985); Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 Miss. L.J. 5, 28-29 (2002); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 121 (2002); Donald R.C. Pongrace, *Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191, 1208 (1985); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 103 (2008); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 Colum. L. Rev. 1751, 1771 (1994); Wasserstrom & Seidman, *supra* note 66, at 28–29.
[261] Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1511 (2010); Etzioni, *supra* note 260, at 420–21.

unpredictable,[262] tautological,[263] and unhelpful in practice,[264] among numerous other flaws.[265] The recent, property-based sub-test is unlikely to substantially improve the *Katz* regime. It mirrors pre-*Katz* precedents that were widely viewed as pernicious or arbitrary[266] and were largely repudiated in *Katz* itself.[267] The sub-test has also proven to be vague, confusing, and capable of generating significant line-drawing problems.[268] The repeated failures of various proxy standards to provide a coherent and effective test reflect the difficulty of fashioning a proxy that can effectively capture the complex balance that underlies the concept of Fourth Amendment search. Section III.A below further explores the potential implications of blank slate theory for Fourth Amendment law.

D. Hostile Work Environment Sexual Harassment

Blank slates may arise when courts are called upon to define an important term or phrase used in a previous decision. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court ruled that sexual harassment constituted "discriminat[ion] … because of such individual's … sex" under the Civil Rights Act of 1964.[269] Further, the Court held that sexual harassment encompassed not only harassment linked to an economic quid pro quo but also harassment creating a hostile work environment.[270] But the Court did not explain how lower courts should determine what makes a work environment hostile.[271] Nor is the concept self-defining or obvious, except in the more extreme cases of workplace harassment.[272]

Courts applying *Meritor* thus lacked a test to guide them in assessing a

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[262] Bradley, *supra* note 260, at 1470; Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1149 (1998).
[263] Baude & Stern, *supra* note 92, at 1824–25.
[264] *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring); *see* Daniel J. Solove, Fourth Amendment Pragmatism, 51 B.C. L. Rev. 1511, 1522–24 (2010).
[265] *E.g.*, Amitai Etzioni, *Eight Nails into* Katz*'s Coffin*, 65 Case W. L. Rev. 413 (2014) (discussing additional flaws in the *Katz* regime.)
[266] *See, e.g.*, EAVESDROPPING ORDERS AND THE FOURTH AMENDMENT, 66 COLUM. L. REV. 355, 357–59 (1966) (citing several such critiques).
[267] *Katz*, 389 U.S. at 352–53; id. at 361 (Harlan, J., concurring).
[268] George M. Dery III, *Failing to Keep "Easy Cases Easy":* Florida v. Jardines *Refuses to Reconcile Inconsistencies in Fourth Amendment Privacy Law by Instead Focusing on Physical Trespass*, 47 LOY. L.A. L. REV. 451, 471–79 (2014).
[269] 477 U.S. 57, 64 (1986).
[270] *Id.* at 66.
[271] A similar phrase also appeared in non-binding EEOC guidelines on sexual harassment, but the guidelines did not define the phrase. 45 Fed. Reg. 74677.
[272] *See id.* at 60, 67 (noting that plaintiff's allegations of pervasive harassment and forcible rape were plainly sufficient for a claim of hostile work environment sexual harassment.)

potentially hostile work environment. Nor was there any statutory text addressing the concept of a hostile environment or anything helpful in the meager legislative history on sex-based discrimination.[273] In the subsequent case *Harris v. Forklift Systems, Inc.*, the Court created such a test, writing on an essentially blank slate.[274] *Harris* established a broad proxy standard, one that looks to all relevant circumstances and specifies several important but non-exhaustive factors, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[275] The Court also required that the employee subjectively perceive the environment as abusive.[276] It rejected a stricter standard that would have required a showing of a serious impact on an employee's psychological well-being.[277]

The Court could have used a direct balancing approach, weighing the various harms to the employee against the potential chilling of non-harassing speech or excessive liability for minor incidents of rudeness. But the blank slate here was fairly narrow, fact-based, and not especially complex.[278] A proxy test is likely to be effective in this context. Indeed, a simpler proxy standard might have been equally effective and easier to apply than the capacious, multi-factor standard the Court chose.[279]

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[273] The prohibition against sex discrimination was added to the statute "at the last minute" and generated relatively little debate. *Meritor*, 477 U.S. at 63–64. As a result, there is "little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'" *Id.* at 64.

[274] *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22–23 (1993). Some analogies might be drawn to hostile environment cases involving race-based discrimination, but those cases had not produced a test prior to *Harris*. *See Meritor*, 477 U.S. at 66 (discussing racial discrimination cases involving non-economic, hostile environment harassment); *Harris*, 510 U.S. at 21–22 (discussing hostile work environment cases).

[275] *Harris*, 510 U.S. at 23.

[276] *Id.* at 21.

[277] *Id.*

[278] Further, the underlying normative considerations likely tilted in favor of a harassment-free workplace, and a lopsided normative balance can contribute to simplicity.

[279] *See Harris*, 510 U.S. at 25 (Ginsburg, J., concurring) (advocating for a standard that focuses on "whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance" and explaining that "[t]o show such interference, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.") (internal quotation marks omitted).

E. Detention During a Police Search

Courts addressing blank slates may choose to adopt proxy rules instead of proxy standards. The choice between rules and standards is a complex one with its own rich scholarly literature.[280] In this context, suffice it to say that proxy rules are likely to be most effective for relatively narrow blank slates, especially when normative considerations tend to strongly favor one outcome.[281] In such situations, a rule will frequently yield the correct outcome while lowering decision costs, meaning that both error costs and decision costs will be low.

The law of detention during search provides an example of a court using a proxy rule to stand in for a fairly one-sided normative balance. In the 1981 case *Michigan v. Summers*, the Supreme Court had to decide when, if ever, the police may detain the occupant of a home while they carry out a valid search warrant.[282] Although text and history usually provide some guidance for courts assessing Fourth Amendment seizures, the issue of detention during a home search was unique because it fell into a conceptual gap created by modern Supreme Court precedents.

Before the 1960s, numerous precedents had established that seizures required probable cause, a requirement that "was treated as absolute."[283] But in *Terry v. Ohio*, the Court held that police officers could perform some limited seizures with less than probable cause, so long as they met the standard of reasonable suspicion.[284] In several other cases, the Court evaluated certain searches and seizures with a reasonableness balancing inquiry, often allowing the police to search or seize with no suspicion at all.[285] It was indeterminate which line of precedents courts should apply to the unique question of when the police may detain a house's occupant while carrying out a valid search warrant. Nor was there any direct formal guidance as to whether the existence of a search warrant could help to justify a seizure.[286]

The Court in *Michigan v. Summers* recognized the normative balance underlying the question of detention during a house search. Indeed, it overtly

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[280] *See discussion supra* Part I.B.3.
[281] *See supra* note 126 and accompanying text.
[282] 452 U.S. 692 (1981).
[283] *Dunaway v. N.Y.*, 442 U.S. 200, 208 (1979).
[284] 392 U.S. 1, 21–22.
[285] *See, e.g.*, *Camara v. Municipal Court*, 387 U.S. 523 (1967); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).
[286] *See Summers*, 452 U.S. at 701–05 (1981) (discussing the search warrant's relevance for related seizures).

weighed the competing considerations.[287] On one side was a significant intrusion on the liberty of the persons detained, although the Court found that this was less intrusive than the search itself, and did not carry the stigma of an arrest on public streets.[288] Further, the risk of abuse was mitigated because any such detention would only occur incident to the execution of a search warrant approved by a neutral magistrate.[289] On the other side of the balance were several benefits: preventing the occupant from fleeing if incriminating evidence was found, minimizing the risk of harm to officers, and potentially avoiding property damage by securing the help of the occupant in opening locked doors or containers.[290] The balance of interests tilted in favor of the government, and the Court accordingly created a categorical rule that "a warrant to search for contraband … implicitly carries with it the limited authority to detain the occupants of the premises."[291]

The Court thus adopted a proxy rule to stand in for the normative balance underlying the question of detention incident to a search warrant. It expressly declined to establish a balancing test.[292] It also rejected several competing proxy standards. The dissent suggested that a seizure incident to a search warrant would only be justified if the police had specific and articulable facts demonstrating a reasonable risk of physical harm.[293] The United States filed an amicus brief arguing that the appropriate standard should ultimately be a reasonable suspicion of unlawful activity.[294] The Court declined to adopt these, preferring a more workable, bright-line rule that did not require officers to evaluate the quantum of suspicion.[295]

A proxy value is likely to be effective in this context. Indeed, the *Michigan v. Summers* rule persists today, generating no especial controversy and recently reaffirmed by the Court.[296] The legal question of *Summers* was narrow, involving

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[287] *Id.*
[288] *Id.* at 701–02.
[289] *Id.* at 703–04.
[290] *Id.* at 702–03.
[291] *Id.* at 705.
[292] *Id.* at 705 n.19 ("[I]f police are to have workable rules, the balancing of the competing interests … must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers. The rule we adopt today does not depend upon such an ad hoc determination.") (internal quotation marks omitted).
[293] *Id.* at 709 n.1 (Stewart, J., dissenting).
[294] Brief for the United States as Amicus Curiae, Michigan v. Summers, Case No. 79-1794, 1980 WL 339690 (December 5, 1980), at *20–22.
[295] *Summers*, 452 U.S. at 705 n.19.
[296] *See Bailey v. United States*, 133 S. Ct. 1031 (2013) (determining the geographical extent of the well-established *Summers* rule). The Court's later extensions of the *Summers* rule

a fairly straightforward normative balance that favored one side. There were several proxies that might have effectively reflected this balance. The Court plausibly concluded that a categorical rule would produce better outcomes over time than the standards favored by the federal government or the dissenting justices.

This section has examined how courts have addressed a variety of blank slate situations. It has drawn lessons from these examples and demonstrated how blank slate theory can help explain the outcomes and doctrines of these important cases. The next Part applies these lessons to broader debates about legal interpretation, as well as the specific context of the Fourth Amendment.

III. IMPLICATIONS OF BLANK SLATE THEORY

This Part examines some of the implications of blank slate theory. It starts by examining how the theory can be used to help courts create effective legal tests in areas where existing tests are working poorly. It then discusses how blank slate theory can inform broader debates about legal interpretation, and how it can augment both formalist and non-formalist interpretive theories. The last section examines the temporal element of legal development, exploring how the decisionmaking regimes discussed in Part II are likely to change over time and describing how blank slate theory can contribute to the growing literature on rulification and legal change.

A. Evaluating and Replacing Existing Legal Tests

Blank slate theory can help courts confronting newly arising blank slates, in cases of first impression and other contexts.[297] It is also helpful in analyzing existing tests and proposing new tests. In situations where formal sources of law are largely silent, precedents may eventually accrue, filling in the blank slate and providing a foundation of formal law to guide future courts. But courts are not infallible and addressing blank slates can be difficult. Often, the tests created by precedent will be substantially flawed or at least subject to serious critique on various grounds.

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have been criticized. *See* Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 Denver L. Rev. 53, 76, 101 (2015).

[297] For example, the Court in *Harris v. Forklift Systems, Inc.* confronted a new blank slate when it was asked to define an important concept established in a previous case but left undefined. *See supra* Part II.D; *see generally supra* Part I.A.1 (discussing the various ways that blank slates can arise).

The analysis developed above can be used to evaluate courts' existing approaches to particular blank slates. And it can bolster—or undermine—proposals in favor of new legal tests. Accordingly, if current law employs a balancing test where a proxy is likely to be more effective, or vice versa, that may be a powerful argument in favor of doctrinal change.

This Section uses the example of the Fourth Amendment's scope, where existing tests have been severely criticized, to show how blank slate theory can provide theoretical support for a substantial legal change. The theory can help improve Fourth Amendment law, pointing the way toward an optimal regime for determining scope and helping to explain why previous approaches like the *Katz* test have been so unsuccessful. A similar exercise might be performed with any of the blank slates identified above or any other blank slates that arise as courts confront new legal questions for which existing formal sources give minimal guidance.

1. Choosing a Legal Regime for Fourth Amendment Search

Imagine that we are considering replacing the current *Katz*-led regime for determining the scope of the Fourth Amendment. (Perhaps we are convinced by the legion of *Katz* critics and the numerous flaws they have identified in the current regime.[298]) We look to formal sources of law like text, history, and purpose, but they are essentially silent on the relevant questions.[299] Blank slate theory can help determine the optimal approach to formulating a new test. Generally speaking, courts might choose either a direct balancing or proxy value test, and blank slate theory can assist courts in systematically evaluating this choice.

The first step would be to assess the likelihood that a proxy value could capture the general normative balance of Fourth Amendment search. This balance has been identified, at least in broad terms, in the Fourth Amendment caselaw and literature: it is the balance between the benefits of improved law enforcement on the one hand and the harms to civilian privacy and security on the other.[300]

Although this abstract balance is easy to identify, each side of it raises complex issues that may be difficult to capture with a simple proxy value. The benefits to

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[298] *See supra* notes 260–268 and accompanying text.
[299] *See supra* Part II.C.
[300] *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 527 (1984); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 526 (2011); Amsterdam, *supra* note 260, at 403.

law enforcement of a certain type of surveillance will often be context-dependent, may vary based on the availability of alternative methods, and are inherently probabilistic—many searches will not yield any evidence or law enforcement benefit. Many of the benefits of crime detection are themselves complicated, such as deterrent effect and the net benefit to society of incapacitating the guilty via imprisonment.[301] On the other side, harms to privacy from government activity are multifaceted and often poorly understood.[302]

Moreover, the technological and social context of government surveillance is particularly unstable. Technological advances like the telephone, recording devices, and the internet have repeatedly destabilized surveillance law and policy by making possible new types of government searches and creating new threats to personal privacy. Emerging technologies and changes to social practices and norms will likely cause similar disruptions in the future.

Finally, Fourth Amendment search is a broad legal concept covering a wide variety of government and private activities. Government surveillance activities alone can range from asking questions of a person on the street, to subpoenaing a suspect's bank records, to using spy satellites to constantly monitor large numbers of people.

All of these considerations suggest that it will be difficult to ever find an effective proxy test for the Fourth Amendment's scope. Because the normative calculus underlying Fourth Amendment search is complex, any proxy value is likely to leave out important normative considerations. The relative instability of the government surveillance context is likely to undermine any proxy test. And it will be difficult to forge a proxy regime to effectively address the broad variety of questions that arise under the concept of Fourth Amendment search.

We would also want to consider how much easier a Fourth Amendment proxy test would be to administer than a direct balancing approach. This will vary depending on the proxy being considered. For example, several scholars have proposed a positive law regime as a proxy approach for Fourth Amendment search.[303] Under a positive law regime, a government action is a Fourth Amendment search if the action is a tort or violates a law.[304] Such a regime would likely be easier to administer than a direct balancing approach, because in many

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[301] *See generally* Orin S. Kerr, *An Economic Understanding of Search and Seizure Law*, 164 U. PA. L. REV. 591, 599 & n.37 (2016).
[302] *See, e.g.*, Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 478–82 (2006) (describing the complexity and the multivalent nature of the legal concept of privacy).
[303] *See* Baude & Stern, *supra* note 92, at 1837–50; Michael Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1284–87 (2015).
[304] *See* Tokson, *supra* note 119, at 191.

cases government actions will clearly be either lawful (operating a helicopter above the legal minimum height) or unlawful (going through a person's trash in violation of a local ordinance). But a positive law approach will not be easy to apply in all cases, because it will frequently be indeterminate. Privacy torts and trespass laws often turn on standards like "reasonableness" that are no more concrete than the vague standards of Fourth Amendment law.[305] And private parties rarely litigate many types of issues that arise in surveillance cases, such as drug-sniffing dogs or CCTV cameras.[306] The administrability benefits of a positive law regime are real, but not nearly as substantial as they initially appear.

Finally, we should consider how likely courts are to be able to obtain the information necessary for normative balancing in the Fourth Amendment context. It may be difficult to find useful information on harms to citizens' privacy, as these harms are hard to quantify and there are relatively few studies on the concrete psychological and social harms of privacy invasions. The government is reasonably well situated to offer useful information about the benefits of a particular search technique to law enforcement, but, in frontier cases, such information will often be conjectural or reflect only limited police use of such a technique.

However, useful information on privacy harms and law enforcement activity has become increasingly available in recent years. Legal scholars have begun the difficult work of quantifying privacy harms, and some relevant psychological studies have been conducted.[307] Courts can increasingly gather, in their own digital records and databases, systemic facts about police behavior.[308] Moreover, some harms related to police searches are easier to quantify than privacy harms, such as the harms caused by police coercion, harassment, or the threat of force.[309] The information relevant to a direct normative balancing test would be somewhat difficult for courts to obtain, but the difficulty is gradually diminishing and there are already several sources of useful information available to courts.

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[305] *See* Re, *supra* note 111, at 320.

[306] *Id.*

[307] *See, e.g.*, Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data Breach Harms*, 96 Texas L. Rev. (forthcoming 2017); Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 335 tbl. (2008); Carl Botan, *Communication Work and Electronic Surveillance: A Model for Predicting Panoptic Effects*, 63 COMM. MONOGRAPHS 293, 307, 307–10 (1996); John R. Aiello & Kathryn J. Colb, *Electronic Performance Monitoring and Social Context: Impact on Productivity and Stress*, 80 J. APPLIED PSYCH. 339 (1995).

[308] *See* Crespo, *supra* note 117, at 2070–86.

[309] Stuntz, *supra* note **Error! Bookmark not defined.**, at 1065–66.

Overall, the considerations discussed in this section suggest that a direct normative balancing test would be the optimal approach to the blank slate of Fourth Amendment search. Every factor suggests a low likelihood that a proxy value will ever be able to capture the Fourth Amendment's normative balance. And a proxy that does not encompass fundamental normative values—a "leaky" proxy—is likely to generate large error costs that dwarf any administrability benefits. For instance, a leaky proxy is likely to decide important cases based on almost wholly irrelevant considerations.[310]

In addition, the administrability benefits of the best-known proxy alternative (a positive law regime) are likely not substantial enough to risk the use of a leaky proxy.[311] The difficulty of obtaining information relevant to normative balancing does weigh slightly in favor of a proxy alternative. But this is typically the least determinative factor, and relevant information is not so scarce as to present a major obstacle to normative balancing.

Ultimately, Fourth Amendment scope is analogous to issues like the scope of the dormant Commerce Clause or the First Amendment's treatment of content-neutral speech regulations. Like the First Amendment, it presents a complex normative balance and covers a broad range of situations. Like the dormant Commerce Clause, the Fourth Amendment has been subject to several proxy rules that have failed because they have been too leaky or too incoherent. As in those contexts, balancing is likely to be the best strategy for addressing the Fourth Amendment's blank slate.

This is not to say that the test for Fourth Amendment scope should *certainly* be a balancing test. Some scholar or court may yet devise a proxy that captures the normative balance underlying the Fourth Amendment but nonetheless remains simple and administrable. Nor is this Article elaborating a specific test or defending such a test against myriad potential objections—that would require another article. Its claim is only that, until an effective proxy emerges, blank slate theory suggests that some form of balancing is likely to be the optimal strategy. Moreover, blank slate theory can help us understand and articulate why the *Katz* standard has failed as a test for the Fourth Amendment's scope.

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[310] For a discussion of this problem in current Fourth Amendment law *see supra* note **Error! Bookmark not defined.** and accompanying text.

[311] *See* Tokson, *supra* note 119, at 194 (describing how a positive law regime would frequently lead courts to decide Fourth Amendment cases based on considerations irrelevant to Fourth Amendment values).

2. Understanding the Failures of the *Katz* Test

Scholars have extensively documented the flaws in the *Katz* test and its failures to protect privacy in a variety of situations.[312] Blank slate theory can give us a broader understanding of precisely why *Katz* has done so poorly.

The *Katz* test has performed badly in part because people's expectations of privacy are a leaky proxy for the fundamental values underlying Fourth Amendment scope. This is reflected in the small but significant number of cases following *Katz* that explicitly or implicitly reject expectations of privacy as a basis for the Fourth Amendment's scope. In *Smith v. Maryland*, for example, the Court explained that in certain situations, the Fourth Amendment will apply even when people lack any expectation of privacy.[313] Indeed, *Smith* overtly acknowledged that the *Katz* standard leaves out vital normative considerations of freedom and privacy.[314] There are also several cases where the Fourth Amendment does not apply even when people in general *do* expect privacy.[315] For instance, despite the fact that people in general expect that their personal conversations will go unrecorded, it is not a search when an undercover officer records such conversations.[316] Again, *Katz*'s focus on "actual expectations of privacy" leaves out important normative considerations.[317]

The failure of the *Katz* test to capture fundamental normative interests is problematic for several reasons. First, despite the cases just described, courts frequently have applied the flawed *Katz* standard and looked to people's expectations of privacy when determining the Fourth Amendment's scope.[318] Lower courts are especially likely to apply the *Katz* test literally in cases of first impression, often reaching normatively questionable results based on their assessments of privacy expectations.[319] Second, the failure of the *Katz* test to

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[312] *See supra* notes [see part II.C.3]
[313] *Smith v. Maryland*, 442 U.S. 735, 740–41 n.5 (1979).
[314] *Id.*; *see also Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984) (downplaying the role of expectations in Fourth Amendment law and noting the flaws in an expectation-based test).
[315] *See, e.g.*, *United States v. Miller*, 425 U.S. 435, 443 (1976); *Illinois v. Caballes*, 543 U.S. 405 (2005).
[316] *United States v. White*, 401 U.S. 745, 751–52 (1971) (noting that people do not expect their conversations to be monitored by government agents and that conversation would be impaired if they did).
[317] *Id.* at 752.
[318] *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 338–39 (2000); *California v. Ciraolo*, 476 U.S. 207, 215 (1986).
[319] *See, e.g.*, *In re Application of U.S. for Historical Cell Site Data*, 724 F.3d 600, 612 (5th Cir. 2013); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008).

embody fundamental Fourth Amendment values has led courts to expand and modify *Katz* haphazardly, creating several conflicting approaches to the Fourth Amendment's scope.[320] The resulting mess of precedents and the need to choose between multiple models of the *Katz* test has perplexed courts and scholars. This confusion also makes the *Katz* test difficult and costly to administer in cases of first impression—further reducing its value as a proxy test.

Thus, blank slate theory provides a useful perspective on the failures of the *Katz* test. *Katz*'s "reasonable expectations of privacy" standard is a leaky proxy, and it has become very difficult to properly apply. Moreover, its failure as a proxy may have been inevitable from the start, given the complexity of the normative balance underlying the Fourth Amendment's scope. The core problem is not how courts have interpreted or limited *Katz* in subsequent cases, but rather the flaws in the very design of the *Katz* standard.

B. Lessons for Interpretive Debates

Blank slate theory can offer a fresh perspective on longstanding debates about legal interpretation. Theories of legal interpretation are numerous and varied, and disputes between competing theories make up a large proportion of our legal discourse. Such theories might be categorized in a variety of ways.[321] For present purposes, I will group interpretive theories into three categories, intended to track the major fault lines of interpretive disputes. First are formal theories of interpretation, those that interpret law based solely on formal sources like text, history, or precedent.[322] Second are extra-formal theories, which posit that legal sources should be interpreted based on both formal sources and external considerations that are nonetheless a part of the legal enterprise.[323] These external considerations might include things like morality or the promotion of liberty.[324] Finally there are instrumental theories, which posit that interpretation should be conducted by considering the consequences of alternative decisions and choosing the best option (as determined by a particular theory like distributive justice, communitarianism, or wealth maximization).[325] Under these theories, formal

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[320] Kerr, *supra* note 3, at 507–22.
[321] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 24 (1990) (categorizing legal theories generally as either "Legalistic" or "Skeptical").
[322] *E.g.*, Baude & Sachs, *supra* note 17, at 1079; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61 (1994).
[323] *E.g.*, DWORKIN, *supra* note 32, at 138–43.
[324] JAMES FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS (2015); STEPHEN BREYER, ACTIVE LIBERTY 17–34 (2005).
[325] *E.g.*, POSNER, *supra* note 321, at 454–69; Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 580–91 (1986).

sources are at most a source of institutional and rule-of-law benefits to be weighed in the overall calculus.[326]

There are vigorous debates between adherents of extra-formal theories and instrumental theories,[327] and epic disputes between formal theorists and those of the other two camps.[328] Yet blank slates function largely outside of these debates, because they exist only when formal sources offer no useful guidance or constraint in interpretation. The unique lessons of blank slate theory can suggest improvements and refinements to all three types of interpretive theory. For instance, it can improve instrumental theories (or at least those that care about maximizing utility) by giving them some specificity in terms of how to create optimal legal tests. Blank slate theory goes beyond directing courts to seek the holding that will produce the best outcome—it provides specific recommendations for tests depending on the characteristics of the underlying situation. Likewise, blank slate theory can improve extra-formal theories that encompass policy considerations or normative justifications for law. For example, blank slate theory may help judges determine which legal test would be the best fit with the normative justifications that underlie a particular law.[329]

Many formalists have noted that legal gaps might, in theory, arise under formal interpretive regimes.[330] Blank slate theory can refine formal theories of interpretation by identifying particular situations where substantial gaps have arisen.[331] And it can improve such theories by offering a normatively appealing method for resolving such gaps in the absence of useful formal guidance.

Blank slate theory also has implications for situations where formal law does provide some guidance. Many laws are only partially determinate, ruling out many interpretations but still permitting a wide variety of potential approaches.[332] In these cases, blank slate theory can help courts choose between competing constructions of a law and create optimal decisionmaking regimes.

In situations where formal law is relatively clear, blank slate theory can help

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[326] POSNER, supra note 1, at 84.
[327] *Compare* DWORKIN, *supra* note 32, at 119–45, *with* POSNER, *supra* note 321, at 197–203.
[328] *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); Richard A. Posner, *The Incoherence of Antonin Scalia*, THE NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism; FLEMING, *supra* note 324, at
[329] See *supra* notes 32–36 and accompanying text.
[330] *E.g.*, Baude & Sachs, *supra* note 17, at 1131, 1146–47; Solum, *supra* note 1, at 471; Merrill, *supra* note 17, at 43.
[331] *See supra* Part II.
[332] *See supra* note 43 and accompanying text.

evaluate existing legal tests. The theory can help instrumentalist decisionmakers trade off the institutional and stability benefits of formal law against the costs of applying inefficient tests. Even under more formal approaches, the theory can help to determine when a statutory test is unworkable and should be amended or repealed, or when courts should overturn or narrowly apply a precedent rather than expanding its reach.[333] The extreme case of blank slates focuses our attention on proxy rules and how well they capture underlying normative values—but even formally compelled rules can be evaluated based on similar criteria. Laws are ultimately normative judgments made concrete, fashioned into rules by legislatures, agencies, or higher courts. We can honor those judgments by interpreting laws correctly. But we should not lose sight of the normative decisions that underpin the laws, nor should we accept proxy rules or standards uncritically even if courts are bound to apply them.

Thinking about law as a spectrum ranging from compelling commands all the way to blank slates may actually bolster formal approaches to interpretation. The tendency to treat all legal questions as determinable by formal sources can ultimately undermine formalism. It can lead formalists to argue for certain outcomes based on conjectural or flimsy formal evidence. (Examples might include the use of far-fetched "textual hooks" to import various principles into the Constitution[334] or unwarranted certitude about obscure historical facts or intentions.[335]) Incorporating blank slate theory and applying its lessons in cases where formal sources provide only slight or ambiguous guidance can help prevent formal theories from becoming outcome-driven and disingenuous in practice. A less totalizing approach to formalism can preserve its role in the vast swath of cases where formal sources really do have something to say.

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[333] *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L. J. 921 (2016) (describing courts' frequent practice of narrowing the scope of controlling precedents).

[334] *See, e.g.*, Donald H. Regan, *Siamese Essays: (i) Cts Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1889 (1987) (criticizing, from a formalist perspective, the misguided use of textual hooks to justify well-liked principles); Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 413 (2003) (critiquing the promiscuous use of textual hooks to support principles that are actually structural).

[335] One example of this is the Court's claim in *United States v. Jones* that it had "no doubt" that police officers' tracking of a car via a GPS device "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." 565 U.S. 400, 404–05 (2012). Given that neither GPS satellites, nor cars, nor police departments, nor a clear concept of "search" existed in 1791, the Court's assertion is questionable and its certitude is troubling. *See Jones*, 565 U.S. at 420 (Alito, J., concurring in the judgment).

C. Blank Slates, Timing, and Rulification

When a court creates a new legal test in response to a blank slate, that test is not frozen forever in time—it continues to develop and change as courts apply it in various situations. This section discusses how the modification of legal regimes over time interacts with blank slate theory.

Rulification occurs when courts applying a standard promulgate sub-rules to address particular situations.[336] The overarching standard remains, but eventually a large proportion of cases is governed by rules. Higher courts may sometimes issue "rules against rulification," instructing lower courts not to rulify a standard when applying it to concrete cases.[337] For example, in *eBay v. MercExchange*, the Supreme Court struck down lower court decisions that had partially rulified the traditional four-factor standard for issuing permanent injunctions.[338] The Court made it clear that, going forward, courts must apply the standard without any shortcuts, engaging in detailed inquiries and tailoring outcomes to the specific facts of each case.[339]

Rules against rulification are least desirable when further experimentation or development in the lower courts is likely to be useful or informative.[340] As lower courts address new cases, they may make broad concepts more concrete, gather additional relevant information, and develop particular sub-rules to improve a doctrine and ease decision costs.[341] Blank slates are, by their very nature, legal questions on which there has been little ferment and where additional experience and information is likely to be helpful. Rulification is thus, in general, likely to be beneficial for both direct normative balancing tests and proxy standards in blank slate contexts.[342]

Normative balancing tests are especially likely to benefit from rulification over time. Balancing tests often have high decision costs that may be lowered by rulification. They also direct courts to weigh the fundamental considerations behind a legal question and give an honest, comprehensive account of the basis

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[336] *See* Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805–06 (2005); Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 169 (2017).
[337] Coenen, *supra* note 79, at 658.
[338] 547 U.S. 388, 393–94 (2006).
[339] *Id.*
[340] *Id.* at 684–85.
[341] *Id.*
[342] Similarly, the "exceptionification" of rules over time is likely to be beneficial for proxy rules. *See* Schauer, *supra* note 336, at 804–05.

for their decisions.[343] This is a complex task, but repeated consideration of a normative question by different decisionmakers can yield useful insights. Courts can also glean valuable information from repeated balancing whenever a balance regularly favors one side over another in particular cases.[344] In those contexts, promulgating a rule to govern similar cases is likely to produce correct outcomes while lowering decisions costs. Ultimately, this analysis suggests that the optimal approach to many blank slates will be initial balancing that eventually hardens into a set of tailored sub-rules to efficiently address particular situations.

CONCLUSION

Any constitutional, statutory, or common-law regime will leave gaps that judges must fill in the course of resolving disputes. Legal blank slates arise when these gaps are too substantial to be resolved with narrow decisions and require a more systematic, forward-looking approach. A framework for thinking about such gaps has been sorely lacking, in part because blank slates have not previously been studied on their own.

This Article has identified the phenomenon of blank slates and provided a methodology for addressing them. Its ultimate goal is to help courts avoid the historical mistakes of dormant Commerce Clause or Fourth Amendment jurisprudence, where courts struggled for decades or centuries to fashion effective legal standards. Indeed, on the complex issue of Fourth Amendment scope, courts are still struggling. The Article has studied this important blank slate in detail and offered a new theoretical framework for the concept of Fourth Amendment search.

Yet blank slates like those discussed above are likely to arise with increasing frequency, as we move ever further away from the world in which the Constitution was drafted. Moreover, in every area of law, societal and technological change will continue to present novel legal questions not contemplated by lawmakers or addressed by formal sources. The importance of a systematic theory of blank slates is likely to grow even greater over time.

Finally, blank slate theory offers hope for advancing longstanding and seemingly intractable debates about legal interpretation. It considers the determinacy of law as a spectrum and uses the extreme case of blank slates to gain new insights into legal interpretation generally. It can augment and refine a variety of interpretive theories, lending specificity and substance to non-formal theories and filling prescriptive gaps in formal ones. Blank slates, like legal gaps

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[343] *See* Mendelson, *supra* note 84, at 825-26.
[344] *See* Blocher, *supra* note 137, at 430–31.

in general, are probably inevitable. But the failure to address blank slates effectively is not.